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Supreme Court of the United States

October Term, 1960

No. 959

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1960

No.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association, CLARENCE N. SAYEN, etc., *et al.*,
Petitioners,

against

ELWOOD R. QUESADA, individually and as Administrator of the Federal Aviation Agency,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Air Line Pilots Association, International, and the individual plaintiffs who are airline pilots and members of Air Line Pilots Association, International, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 9, 1961.

Opinions Below

The opinion of the United States District Court for the Southern District of New York on the denial of plaintiffs' motion for a preliminary injunction (Appendix to Appellants' Brief in the United States Court of Appeals for the Second Circuit, App. 315a-321)* is reported at

* The Appendix to Appellants' Brief in the United States Court of Appeals for the Second Circuit that was prepared for purposes of plaintiffs' appeal from the order denying their motion for a preliminary injunction was also the major portion of the record on which plaintiffs' appeal from the order granting defendant's motion for summary judgment was heard. References to it are designated "App."

182 F. Supp. 595. The opinion of the Court of Appeals affirming the denial of plaintiffs' motion for a preliminary injunction (Appendix B, *infra*, pp. 65a-75a) is reported at 276 F. 2d 892. The opinion of the District Court granting defendant's motion for summary judgment (Supplementary Appendix for Appellants in the United States Court of Appeals for the Second Circuit, Supp. App. 326a)* and the opinion of the Court of Appeals affirming the order granting defendant's motion for summary judgment (Appendix C, *infra*, pp. 76a-78a) have not yet been reported.

Jurisdiction

A judgment of the Court of Appeals affirming the denial of plaintiffs' motion for a preliminary injunction was dated and entered on April 21, 1960. The judgment of the Court of Appeals affirming an order granting defendant's motion for summary judgment and dismissing the complaint was dated and entered on February 9, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Whether the Administrator of the Federal Aviation Agency may take action amending, modifying, suspending, or revoking airmen certificates without complying with Section 609 of the Federal Aviation Act of 1958?

2. Whether the due process clause of the Fifth Amendment to the United States Constitution requires that airmen whose certificates are amended, modified or revoked be accorded notice and hearing before the action becomes effective with respect to their certificates?

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* The Supplementary Appendix for Appellants in the United States Court of Appeals for the Second Circuit consists of pages 324a to 333a. References to it are designated "Supp. App."

[illegible] whether airmen certificates granted under the Federal [illegible] Act of 1958 and the predecessor statutes may be limited, [illegible] and [illegible] 5 U.S.C. [illegible] certificates to terminate at age 60 was arbitrary and unreasonable, and therefore in violation of the due process clause of the Fifth Amendment to the United States Constitution?

Constitution, Statutes and Regulations Involved

The pertinent provisions of the United States Constitution, the Federal Aviation Act of 1958 (72 Stat. 731, 49 U. S. C. § 1301, *et seq.*), the Administrative Procedure Act (60 Stat. 237, as amended, 5 U. S. C. § 1001, *et seq.*), and the Civil Air Regulations are set forth in Appendix A, *infra*, pages 1a-64a, 14 C. F. R., Parts 20, 21, 29 and 40.

Statement

Air Line Pilots Association, International, is an unincorporated association which represents the professional airline pilots employed by scheduled United States air carriers. The individual plaintiffs herein are airline pilots who hold airman certificates and Airline Transport Pilot Rating Certificates for which they had duly qualified prior to June 27, 1959 under the provisions of Title VI of the Federal Aviation Act of 1958, 49 U. S. C. §§ 1421-1430 and the relevant provisions of the Civil Air Regulations, 14 C. F. R., Parts 20, 21 and 29 and the predecessor statutes and regulations. Prior to March 15, 1960, the date that the administrative action attacked herein became effective the individual plaintiffs were employed as pilots by various scheduled United States air carriers; and nineteen of them had reached the age of 60. Elwood R. Quesada was the Administrator of the Federal Aviation Agency at the time that the administrative action challenged herein was taken; Najeeb Halaby, his successor in office, has since been substituted for Quesada as defendant herein.

On June 27, 1959, defendant, by publication at 24 Fed. Reg. 5247-5249 (1959) (App. 278a-281a), gave notice of intention to amend Parts 40, 41, and 42 of the Civil Air Regulations which deal with certification and operation rules for air carriers. Prior to the proposed amendment, 14 C. F. R. § 40.260 provided:

> "*Utilization of airman.* No air carrier shall utilize an individual as an airman unless he holds a valid appropriate airman certificate issued by the Administrator and is otherwise qualified for the particular operation in which he is to be utilized."

The Administrator proposed to amend this section by designating the above text as paragraph (a) and adding thereto a new paragraph (b), as follows:

> "No individual who has reached his 55th birthday shall be utilized or serve as a pilot in command, or as second in command of a flight crew of 3 or more pilots, on a turbojet-powered aircraft engaged in air carrier operations unless he held an aircraft type rating for the particular aircraft either prior to such birthday or the effective date of this regulation. In addition, no individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft engaged in air carrier operations."

The same amendment was to be made in 14 C. F. R. § 41.48 and 14 C. F. R. § 42.40.

The authority cited by the Administrator for the above amendments was Sections 313(a), 601, 602 and 604 of the Federal Aviation Act of 1958, 49 U. S. C. §§ 1354, 1421, 1422 and 1424.

Written comments, both for and against the proposed amendments, were received by the Administrator, including opposing comment from the Air Line Pilots Association, International, and individual pilots. In addition, plaintiff Air Line Pilots Association, International, on behalf of

the individual plaintiffs herein and on its own behalf, requested the Administrator to schedule a hearing at which the proposed amendments could be considered (App. 7a).

The Administrator denied the request for a hearing insofar as the age 60 maximum was concerned (App. 261a-262a).

On December 1, 1959, the Administrator issued the following amendment to Parts 40, 41 and 42 of the Civil Air Regulations, 14 C. F. R. §§ 40.260, 41.48 and 42.40:

> "No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any* aircraft while engaged in air carrier operations." (App. 262a)

The Administrator made no finding that an emergency existed and provided that the amendment was to take effect on March 15, 1960. The Administrator did not amend Parts 20, 21 or 29 of the Civil Air Regulations, 14 C. F. R. Parts 20, 21, and 29, dealing with pilot certificates, airline transport pilot rating, and physical standards for airmen, respectively.

Plaintiffs brought suit in the United States District Court for the Southern District of New York for an injunction and for a declaratory judgment declaring the amendment null and void. The jurisdiction of the court was based on 28 U. S. C. §§ 1331 and 1337. Plaintiffs alleged that the amendments were invalid because they had not been issued in conformity with, and denied affected pilots, the safeguards of (a) the procedural requirements of Section 609 of the Federal Aviation Act of 1958, 49 U. S. C. § 1429; or (b) the procedural requirements of Sections 4, 5, 7, and 8 of the Administrative Procedure Act, 5 U. S. C. §§ 1003, 1004, 1006 and 1007; or (c) the requirements of the Fifth Amendment to the United States Con-

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* In 14 C. F. R. § 42.40 the word "large" modifies the word "aircraft."

stitution. Plaintiffs also alleged that the Administrator's action was arbitrary and unreasonable and therefore constituted a violation of the Fifth Amendment to the Constitution.

Plaintiffs moved for a preliminary injunction and defendant cross-moved for summary judgment.

Plaintiffs' motion for a preliminary injunction was denied by an order of the United States District Court for the Southern District of New York, filed on March 14, 1960 (App. 315a-321a). Plaintiffs thereupon appealed to the Court of Appeals for the Second Circuit.

The Court of Appeals affirmed the denial of the preliminary injunction on the ground that the action of the Administrator constituted rule making and the Administrator followed the procedural requirements for rule making in Section 4 of the Administrative Procedure Act, 5 U. S. C. § 1003. The Court also held that the fact that the amendment modified the licenses of airmen did not require the Administrator to follow the procedures set forth in Section 609 of the Federal Aviation Act of 1958, 49 U. S. C. § 1429. On this point the Court said:

> "The plaintiffs strenuously urge that, however things may be under the Administrative Procedure Act, the statutory scheme of the Federal Aviation Act shows that Congress intended to afford airmen the greater protection of an individual hearing before their certificates may be modified. We disagree. Section 609 of the Act, 49 U. S. C. § 1429, states that 'the Administrator may * * * reexamine any civil airman,' and if, as a result of such reexamination, the Administrator 'determines that safety in air commerce * * * and the public interest requires, (he) may issue an order amending, modifying, suspending, or revoking * * * (any) airman certificate.' The certificate holder must be advised of the 'charges or other reasons relied upon by the Administrator' for his action, and a hearing must be afforded with a right of appeal and trial *de novo*

before the Civil Aeronautics Board and ultimate rights of review in the courts of appeals. It is clear that Congress intended that the section should apply only when an order of the Administrator is directed to an individual airman and is concerned with conduct or other facts peculiar to that airman. Use of 'airman' in the singular, the reference to 'charges,' the word 'order' in contrast with 'regulation' in § 601, and the statement that upon review the Board shall not 'be bound by findings of fact of the Administrator' all strongly suggest that § 609 is not intended to apply when a general directive of the Administrator is promulgated, though the regulation may in fact modify airmen's certificates. Cf. §§ 602, 604 of the Act, 49 U. S. C. §§ 1422, 1424. Moreover, were we to interpret § 609 to apply to a case like that before us, the area in which § 601 might operate would be severely restricted." (Appendix B, *infra*, p. 72a).

Thereafter, on June 14, 1960, the United States District Court granted defendant's motion for summary judgment (Supp. App. 326a). Its action was affirmed by the Court of Appeals in an order dated and filed on February 9, 1961, on the same grounds on which the Court of Appeals had based its decision affirming the order of the District Court denying plaintiffs' motion for a preliminary injunction (Appendix C, *infra*, pp. 76a-78a).

Reasons for Granting the Writ

1. This case involves an important question of first impression concerning the interpretation of § 609 of the Federal Aviation Act of 1958, 49 U. S. C. § 1429, to determine the degree of protection afforded the holders of airman certificates, air-worthiness certificates, production certificates, air carrier operating certificates, and other certificates issued under the Federal Aviation Act of 1958, 49 U. S. C. §§ 1422, 1423, 1424, 1426 and 1427, against

amendment, modification, suspension or revocation of their certificates. The Administrator directed air carriers not to permit any pilot who was over 60 years of age to serve as a pilot on any aircraft engaged in commercial air operations. See opinion below, Appendix B, *infra*, page 66a, note 1. The immediate effect of the Administrator's action was to bar some 40 pilots from continuing to practice their profession on March 15, 1960, the effective date of the action (App. 255a). Since then, the effect of the Administrator's action has been to automatically terminate the rights of all pilots who reach the age of 60 to pilot aircraft in commercial air operations. Thus, the Administrator's action has destroyed the value of the airman certificates issued to these pilots as a license permitting them to fly aircraft in commercial air operations.

Since the Courts below considered the Administrator's action as "rule making", it has thus far been held that neither Section 609 of the Federal Aviation Act, 49 U. S. C. § 1429, nor Sections 5, 7 and 8 of the Administrative Procedure Act, 5 U. S. C. §§ 1004, 1006, and 1007, required the Administrator to hold a hearing prior to the promulgation of the regulation. For the same reason and because the Administrator's action was directed to the air carriers and not at the airmen's certificates it has thus far been held that individual pilots who reached age 60 prior to the effective date of the Regulation and those pilots who have reached age 60 since then are not entitled to an opportunity to be heard before the Regulation is applied to them. See opinion below, Appendix B, pages 72a-74a. Thus, by means of promulgating a regulation and directing the regulation at the employers of the pilots affected by it, the Administrator has prevented pilots holding valid airman certificates from obtaining a hearing at any stage, either before or after the administrative action is applied to them to terminate their right to practice their profession.

The importance of the question presented in this case is apparent from the fact that the Administrator could follow the very same procedure to adversely affect holders of other certificates under the Federal Aviation Act. For example, a regulation directed at air carriers with respect to the type of aircraft they could use, could render valueless a type certificate issued under § 603 of the Act, 49 U. S. C. § 1423. Further, the same procedure could be followed by other agencies. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407 (1942). Thus, if the administrative action herein is held to be valid, the rights of other persons holding certificates under the Federal Aviation Act could also be modified, and even destroyed, without providing them with notice or an opportunity to be heard at any stage of the proceedings.

The decisions below are erroneous because they fail to give any effect to Section 609 of the Federal Aviation Act, 49 U. S. C. § 1429. Section 609 provides as follows:

> "The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, air-worthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, sus-

> pended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings."

It is apparent that Section 609 provides substantial safeguards to holders of certificates. First, unless the Administrator finds that an emergency exists he must provide the holder of a certificate with an opportunity to "be heard as to why such certificate should not be amended, modified, suspended or revoked". Second, "any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation" of the Administrator's order. Third, in the conduct of its hearings the Board is not "bound by findings of fact of the Administrator". Fourth, unless the Administrator advises the Board that an emergency exists and that safety requires the immediate effec-

tiveness of his order, the filing of an appeal with the Board stays the effectiveness of the Administrator's order. And fifth, provision is made for judicial review of the Board's order by the Courts of Appeal.

The courts below held that the safeguards provided in Section 609 are not applicable to an amendment or modification of a certificate that is accomplished by means of a regulation. That the Administrator's action constitutes an amendment and modification of pilots' certificates, and indeed, an effective suspension and revocation of the certificates of pilots above the age of 60 to fly in commercial air transportation, was admitted by the Administrator and not questioned by the Court of Appeals (App. 262a-263a, 264a; Appendix B, pages 70a-72a). The decisions of this Court in *FCC* v. *National Broadcasting Co., Inc. (KOA)*, 319 U. S. 239 (1943), *Parker* v. *Fleming*, 329 U. S. 531 (1947), *FCC* v. *WJR, the Goodwill Station, Inc.*, 337 U. S. 265 (1949), and *Columbia Broadcasting System* v. *United States*, 316 U. S. 407 (1942), leave no question but that the action of the Administrator herein constitutes an amendment and modification of pilots' certificates. But the Court below reasoned that the exercise by the Administrator of his safety rule making power under Section 601(a) of the Federal Aviation Act, 49 U. S. C. § 1421(a) was not limited by Section 609 of the Act, 49 U. S. C. § 1429 even though it resulted in amending, modifying, suspending or revoking airman certificates. See Appendix B, p. 72a. The Court said:

> "• • • it is clear that Congress intended that the section should apply only when an order of the Administrator is directed to an individual airman and is concerned with conduct or other facts peculiar to that airman. Use of 'airman' in the singular, the reference to 'charges', the word 'order' in contrast with 'regulation' in § 601 and the statement that upon review the Board shall not 'be bound by findings of fact of the Administrator' all strongly suggest that § 609 is not intended to apply when a

general directive of the Administrator is promulgated, though the regulation may in fact modify airmen's certificates. Cf. §§ 602, 604 of the Act, 49 U. S. C. §§ 1422, 1424. Moreover, were we to interpret § 609 to apply to a case like that before us, the area in which § 601 might operate would be severely restricted." (See Appendix B, p. 72a)

The Court also believed that the legislative history of the Federal Aviation Act supported its conclusion. It said:

"There is no indication anywhere that Congress intended such limitation on § 601. Indeed, the legislative history of the Federal Aviation Act and the practice under the prior law show that Congress intended the Administrator to have broad power to establish safety rules for the nation's airways without the delay attendant upon numerous individual hearings and protracted appeals. The immediate impetus to the legislation was a series of major air crashes culminating in the midair collision of two large airlines [sic] over the Grand Canyon in 1956 with the loss of 128 lives. Congress believed there was a need for a more streamlined and efficient means of safety rule-making in place of the system of divided duties and responsibilities existing under the Civil Aeronautics Act. The committee reports make plain that the Administrator was to have sole responsibility for safety rule-making under the new law, and that the procedures of § 609 were only to come into operation when the Administrator modified or revoked 'a certificate'. H. R. Rep. No. 2360, 85th Cong., 2d Sess. (1958); see S. Rep. No. 1811, 85th Cong., 2d Sess. (1958). The elaborate procedural requirements of § 609 are patently incompatible with the expedition with which Congress intended that the Administrator should act in the promulgation of safety rules. The clear public interest in the speedy adoption of rules relating to air safety far outweighs any possible advantage in a multitude of piecemeal and time-consuming hearings brought by each contesting airman." (Appendix B, pp. 72a-73a)

It is respectfully submitted that the conclusions in the Court below are not supported by the structure of the Federal Aviation Act of 1958 or by its legislative history. Insofar as the decision of the Court is based on the use of the word "airman" in the singular, the reference to "charges" and the use of the word "order", it is subject to the criticism recently expressed by this Court that "insights derived from syntactical analysis form a hazardous basis for the explication of the major legislative enactments * * *." See *Local 1424, IAM, AFL-CIO* v. *NLRB*, 362 U. S. 411, 417, n. 7 (1960). Further, it is clear from decisions of this Court that the word "order" is a word that can refer to administrative action in the nature of rule making. See *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 432 (1947); *Columbia Broadcasting System* v. *United States*, 316 U. S. 407 (1942); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 147 (1941). And it is accepted construction of statutes that use of the singular includes the plural. See, *e.g.*, N. Y. GENERAL CONSTRUCTION LAW, § 35.

Both the structure and the legislative history of the Federal Aviation Act indicate that Congress intended that rules promulgated by the Administrator that have the effect of amending, modifying, suspending or revoking airman and other certificates issued under the Act should be subject to the procedural requirements of § 609. Thus, the Act requires the Civil Aeronautics Board, and not only the Administrator, to consider "the promotion of safety in air commerce" in the exercise and performance of its powers and duties under the Act. See Federal Aviation Act, §§ 102(e), 102(b), 49 U. S. C. §§ 1302(e), 1302(b). And § 609 permits the Administrator to take action amending, modifying, suspending or revoking certificates "as a result of any other investigation made by the Administrator", and empowers the Board in reviewing the Administrator's action to "amend, modify, or reverse * * * if it finds that safety in air commerce or air transportation and the

public interest do not require affirmation of the Administrator's order * * *." This is not the scope of review that is afforded when the question is merely whether the Administrator's findings of fact support action by him amending, modifying, or revoking a certificate. When Congress desired to limit the scope of review that the Civil Aeronautics Board was to exercise over action of the Administrator to such narrow compass it did so by the use of suitably narrow language. Thus, in § 602(b), which permits an applicant for an airman certificate to appeal from the Administrator's denial of a certificate to the Board, on review the Board is only to determine "whether the airman meets the pertinent rules, regulations, and standards * * *." See Federal Aviation Act, § 602(b), 49 U. S. C. § 1422(b). Thus, the language of the statute indicates that Congress empowered the Civil Aeronautics Board to review regulations of the Administrator that amend, modify, suspend or revoke airman certificates.

This conclusion is reinforced by the legislative history of the Federal Aviation Act. While it is true that one purpose of the Federal Aviation Act of 1958 was to vest in the Administrator power to make air safety regulations that was not subject to review by the Civil Aeronautics Board, it was not intended that this power should extend to regulations that amended, modified, suspended or revoked certificates under the Act. This is apparent from the hearings, reports, and debate on the Act. For example, when General Elwood R. Quesada appeared before the Sub-Committee on Aviation of the Senate Committee on Interstate and Foreign Commerce to testify on the bill that later became the Federal Aviation Act of 1958, the following colloquy took place between him and Senator Monroney, the Chairman of the Sub-Committee and floor manager of the bill in the Senate:

> "Senator Monroney. * * *
>
> "As I understand the bill and the proposed amendments, the possible differences that will need

to be spotlighted in the amendments that you suggest fall into three general categories:

"1. The promulgation of air safety rules, which is identical with the present bill, S. 3880, the difference being only in the degree of appeal.

"Mr. Quesada: Yes, sir:

"Senator Monroney. We are together on the question of the right of appeal to the Board on matters involving decisions by the Administrator on airmen and on aircraft.

"Mr. Quesada. That is correct.

"Senator Monroney. And we are perhaps closer together on the matter of decisions involving the allocation of airspace being exempted from appeal. The question is whether permission to appeal to the Board on 1 or 2 other points should be included. It is probably only on 1 of the 3 matters relating to air safety regulations, the right of appeal in 1 out of 3 where there is some small degree of difference."

Hearings before the Sub-committee on Aviation of the Senate Committee on Interstate and Foreign Commerce on S. 3880, 85th Cong., 2d Sess., pages 155-156.

And during the debate on the bill, Senator Thye asked Senator Monroney, "* * * Will the Civil Aeronautics Board continue in existence if the bill is enacted into law?" Senator Monroney replied:

"Indeed it will, save for the one function dealing with safety rules which are now handled by the Civil Aeronautics Board. * * * The provision dealing with safety regulations is the one change with respect to the present jurisdiction of the Civil Aeronautics Board which has been made.

"Under the provisions of this bill, even in that respect the Board is given the right to hear and determine two types of appeals invoving airmen's certificates and the certification of aircraft on reinspection by the Administrator." 104 Cong. Rec. 13646 (1958).

The reports on the Federal Aviation Act also show that Congress was aware that the Civil Aeronautics Board was empowered under Section 609 to review actions of the Administrator involving airman certificates and other certificates. H. R. Rep. No. 2360, 85th Cong., 2d Sess., distinguishes between the safety rule making area in which the Administrator is to have plenary authority and the area in which his actions are to be subject to review by the Civil Aeronautics Board. It states:

> "The principal purpose of this legislation is to establish a new Federal Agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations."
>
> • • •
>
> "The Administrator of the New Federal Aviation Agency (1) would be given full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations • • •.
>
> "At the same time, the legislation would continue the Civil Aeronautics Board, with the same authority it now has with respect to air carrier economic regulation • • •. The Civil Aeronautics Board is given authority to hear and determine two types of appeals. Appeals can be taken to the Board from actions of the Administrator involving airmen's certificates and the certification of aircraft on reinspection by the Administrator.
>
> "The new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to—
>
> "(a) Allocate airspace and control its use by both civil and military aircraft;
>
> "(b) Make and enforce air traffic rules for both civil and military aircraft;
>
> "(c) Develop and operate a common system of air navigation facilities for both civil and military aircraft;
>
> "(d) Make and enforce safety regulations governing the design and operation of civil aircraft." (At pp. 1-2).

And see H. R. Rep. No. 2360, 85th Cong., 2d Sess., pp. 6-8, 29 (1958); Hearings Before the Sub-Committee on Aviation of the Senate Committee on Interstate and Foreign Commerce on S. 3880, 85th Cong., 2d Sess. 164-165 (1958) (Testimony of Elwood R. Quesada); Hearings Before a Sub-Committee of the House Committee on Interstate and Foreign Commerce on H. R. 12616, 85th Cong., 2d Sess. 94-95 (1958) (Testimony of James T. Pyle, Administrator of Civil Aeronautics); Statement of Congressman Oren Harris, 104 Cong. Rec. 16081 (1958) Statement of Congressman Flynt, 104 Cong. Rec. 16084 (1958).

This legislative history indicates that Congress intended in Section 609 to provide a procedure which was to be followed by the Administrator and the Civil Aeronautics Board whenever action was taken amending, modifying, suspending, or revoking airman certificates and other certificates granted under the Act. Congress may well have concluded that the broad powers granted to the Administrator that were not subject to review by the Board should not include the power to take actions amending, modifying, suspending or revoking certificates granted under the Federal Aviation Act because of the investment in training, time, and money that is required to secure an airman certificate or any other certificate under the Act.

But the Court below held that compliance with the procedural requirements of Section 609 of the Act "are patently incompatible with the expedition with which Congress intended that the Administrator should act in the promulgation of safety rules * * *." See Appendix B, p. 73a. And the Administrator argued that requiring that all action that amends, modifies, suspends or revokes certificates be taken in compliance with the procedures of Section 609 of the Act would necessitate that all safety rule making be promulgated in accordance with Section 609 (App. 264a-265a). That compliance with the procedure

set forth in Section 609 would not delay the promulgation of orders of the Administrator is clear on the face of the section. Section 609 permits the Administrator to take immediate action amending, modifying, suspending or revoking certificates whenever he believes that an emergency exists. See Federal Aviation Act, §§ 609, 1005, 49 U. S. C. §§ 1429, 1485. Nor is the argument that all safety regulations would have to be issued in compliance with Section 609 valid. Section 609 need only be complied with when the action of the Administrator amends, modifies, suspends, or revokes certificates. Not all safety regulation would result in amendment or modification of airmen certificates or other certificates issued under the Act. The question of whether a regulation amends, modifies, suspends or revokes a certificate within the meaning of § 609 of the Act depends on the degree of the impact of the regulation on the holder of the certificate. This is the type of determination that administrative agencies and courts are often called upon to make in determining a person's standing to intervene in an administrative proceeding or to appeal from administrative action. See, *e.g.*, *Parker* v. *Fleming*, 329 U. S. 531, 538 (1947); *L. Singer and Sons* v. *Union Pacific RR.*, 311 U. S. 295, 304 (1940); *FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265, 279-280 (1949); Concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 151-153 (1951). These cases make it abundantly clear that not all action that may remotely affect certificates would be considered as action "amending, modifying, suspending, or revoking" the said certificates so as to require that the procedures set forth in Section 609 of the Federal Aviation Act be followed.

In the instant case, the Administrator's action does not give rise to a far fetched claim that exercise of his rule making authority has amended and modified the certificates of pilots. Instead, the situation is one in which airmen holding valid certificates find that the value of their

certificates and the license that it gave them to pilot aircraft in air commerce are nullified. Such action is clearly an amendment and modification, indeed, in the case of pilots over the age of 60 a suspension and revocation, of airman certificates. In taking such action, the Administrator should be required to comply with the express procedural requirements of Section 609 of the Act.

2. But even if the Court should hold that the procedures of § 609 of the Act need not be followed when the Administrator adopts a regulation that has the effect of amending, modifying, suspending, or revoking airman certificates, the Administrator's action that is challenged herein is still violative of the provisions of § 609 of the Act, 49 U. S. C. § 1429, and still raises important questions concerning the interpretation and application of that section of the Act.

In the instant case the Administrator has not only denied adversely affected pilots an opportunity to be heard before promulgation of the regulation. He has also effectively prevented the approximately forty pilots who lost their jobs and the value of whose certificates to pilot aircraft in air commerce was destroyed on the effective date of the age 60 regulation from securing a hearing at any stage, either before or after the regulation was applied to them to terminate their right to pilot aircraft in air commerce. Thus, the Administrator has combined the legislative and adjudicative functions into one self-executing determination which sets the policy and fully accomplishes the implementation of that policy by depriving a small group of individuals of their jobs and the value of their licenses, without affording the individuals affected by his action any opportunity to question its validity or its applicability to them.

It is respectfully submitted that, at the very least, these forty airmen who were most immediately and directly affected by the regulation were entitled to make use of the procedural safeguards of § 609 of the Federal Aviation

Act of 1958, 49 U. S. C. § 1429, before the regulation was applied to them to deprive them of their jobs and the value of their licenses. Indeed, it is difficult to see any scope for § 609 of the Act, if it is not effective to give each of these forty pilots (in the absence of an emergency) the right to a hearing before the Administrator and to appeal the Admniistrator's determination to the Civil Aeronautics Board before the regulation is applied to him.

That the action of the Administrator constitutes in fact and in law an amendment, modification, suspension, and revocation of the licenses of these forty pilots to pilot aircraft in air commerce has been shown above. See p. 11, *supra*. That each of these forty pilots is therefore entitled to a hearing at some time before the regulation is finally held applicable to him is clear from the face of the statute, its legislative history and the past practice under both the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301-1542, and the Civil Aeronautics Act of 1938, 52 Stat. 973, ff. Section 609 of the Act requires the Administrator to advise a certificate holder of his reasons for amending, modifying, suspending, or revoking the certificate. And, unless an emergency exists, the Administrator must give the certificate holder an opportunity to be heard on why the certificate should not be amended, modified, suspended or revoked.

If the Administrator had followed the statutory procedure with respect to the certificates of the forty airmen most immediately and directly affected by the regulation, each of them would have had an opportunity to raise the issues of the validity of the regulation, and its applicability to him. And each of them would have had an opportunity to request a waiver under 14 C. F. R. § 29.5.

Nor would such a hearing be a meaningless formality. Even in the application of a regulation that hinges on the question of a person's age, difficult fact questions *e.g.*,

the question of whether an individual airman was sixty years old, might arise. See *Vinson* v. *Hobby*, 114 F. Supp. 663 (D. S. W. Va. 1953).

In addition, in challenging the validity of the regulation as applied to him before the Administrator, the airman would have an opportunity to convince the Administrator that the regulation was invalid and that he was entitled to a waiver.

Section 609 of the Act also provides for an appeal to the Civil Aeronautics Board. The Board is not bound by the Administrator's findings of fact and "may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation" of the order. On such an appeal, each of the pilots the value of whose certificates to fly in air commerce was destroyed, could question the Administrator's determinations as to the validity of the regulation, its applicability to him, and his right to a waiver.

The Court below concluded that the procedural safeguards in § 609 of the Act were "not intended to apply when a general directive of the Administrator is promulgated, though the regulation may in fact modify airmen's certificates * * *." See Appendix B, p. 72a. The statute does not support the Court's conclusion. Indeed, under § 602(b) of the Act, 49 U. S. C. § 1422(b), even an applicant for an airman certificate is entitled to have the Civil Aeronautics Board review the Administrator's action denying him a certificate. On such review the Board is not bound by the Administrator's findings of fact, and it determines whether the Administrator has applied his "general directive(s)" accurately since the Board decides "whether the airman meets the pertinent rules, regulations, and standards * * *."

It is clear that in providing procedural safeguards for airmen holding valid certificates in § 609 of the Act, Con-

gress intended to provide more extensive protection than it provided for applicants for airman certificates in § 602(b). The fact that § 609 empowers the Civil Aeronautics Board to amend, modify or reverse the Administrator's order after notice and hearing

> "if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the * * * order * * *,"

indicates that the Board is to do more than determine whether the Administrator has applied his "general directive" accurately. It is also to determine whether the "general directive" is valid as applied to the individual airman.

The legislative history of the Federal Aviation Act proves that this appraisal of the power of the Board under Section 609 of the Act is correct. Thus, the House Report on the bill that became the Federal Aviation Act states:

> "In transferring safety rulemaking functions to the new agency, this legislation does not strip the Civil Aeronautics Board of all of its responsibilities in the field of safety. Certain definite and very important safety responsibilities are retained in the Board.
>
> "The Board, as an independent, quasi-judicial body, will hear appeals from certain actions of the Administrator affecting certificates. An appeal to the Board is provided from a refusal by the Administrator to issue a certificate, except where the certificate is under suspension or has been revoked within 1 year.
>
> "When the Administrator revokes, modifies, or suspends a certificate under Section 609, an appeal to the Board is provided.
>
> "In order to expedite the safety-enforcement process, section 609 of the legislation changes the present law by permitting the Administrator to amend, modify, suspend or revoke safety certificates prior to formal proceedings before the Civil Aeronautics Board. However, in order to protect the

holders of certificates from arbitrary action, the Administrator is required, except in cases of emergency, before taking any action to advise the holder of the certificate of the nature of the charges against him and to give the holder an opportunity to present informally his defenses to the Administrator. If, after this informal presentation, the Administrator is still of the opinion that the certificate should be amended, modified, suspended, or revoked, the Administrator may take such action. Thereafter, if the holder of the certificate disagrees with the action of the Administrator, he may appeal to the Civil Aeronautics Board, where he will be given a full hearing complying in all respects with the requirements of the Administrative Procedure Act. In this hearing before the Board, the Administrator will have the normal burden of proof to establish facts justifying the amendment, modification, suspension or revocation of the certificate." (H. R. Rep. No. 2360, 85th Cong., 2d Sess. 8 (1958).)

And see pages 14-17, *supra*.

Moreover, it is undisputed that, in twenty-two years of practice under the Civil Aeronautics Act of 1938, in every instance where a physical standard was to be *applied* in derogation of the rights of the holder of an existing certificate, that individual was accorded the opportunity for hearing and review under the predecessor of present Section 609 (Appendix, p. 298a).

Congress, in enacting the Federal Aviation Act of 1958, approved the practices utilized under the Civil Aeronautics Act of 1938 by which physical standards were promulgated and then applied to individuals. By reenacting relevant provisions of the prior statute, Congress adopted as controlling the prior practice. See letter from James T. Pyle to Congressman Harris, H. R. Rep. No. 2360, 85th Cong., 2d Sess. 29 (1958). Administration of the Federal Aviation Act conformed to this Congressional intent until the Administrator issued the instant determination.

Physical standards for airmen promulgated under Section 601 or its predecessor have always been incorporated into Part 29 of the Regulations, entitled "Physical Standards for Airmen."

Adjudications incorporating a trial-type hearing have been the sole means by which these physical standards have been applied to airmen. Issuance, denial, amendment, modification, suspension or revocation of airman certificates have been the results produced by these physical standards adjudications.

In contrast, the Administrator has here established a policy and revoked certificates in one step, and has held no hearings. To accomplish this, he has inserted the determination of physical standards into Parts 40, 41 and 42 of the Civil Air Regulations, ostensibly directed at the air carriers rather than the airmen.

A study of physical standards cases under the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958 has been prepared and is annexed hereto as Supplement A. This study includes all physical standards cases reported by the Civil Aeronautics Board from July 21, 1939 to and including November 18, 1959, immediately prior to the date the instant determination was issued.

Each of these cases involves the application of a physical standard to an airman. All represent appeals to the Civil Aeronautics Board from action by the Administrator denying or revoking an airman certificate.

The study covered approximately 115 cases. The cases involved airmen with such defects as defective vision or hearing, diabetes, hypertension, asthma, drug addiction, tuberculosis, personality abnormality, heart disease, mental illness, high blood pressure and epilepsy. Five of the cases involved hearings on applications denied by the Administrator solely because of the applicant's age.

In over 45% of these cases, the Administrator's denial or revocation of a certificate was reversed by the Civil Aeronautics Board. In still others, appeals from such action by the Administrator resulted in a remand to him for further consideration.

In every case, including the five "age" cases, the opportunity to be heard and to present and rebut evidence was extended to the airman affected. At the hearings, waivers were requested and frequently were granted by the Board, as the study shows. It is highly significant that the Board granted a waiver to one individual whose application was denied by the Administrator solely because he did not meet the age requirements contained in the Civil Air Regulations. See 14 C. F. R. § 20.30.

Each of these cases, as the study shows, involved an opportunity for the affected airman to be heard, and to submit and rebut evidence. Furthermore, in every case, the individual was afforded the opportunity to apply for a waiver from the terms of the physical standard, as provided by Section 29.5 of the Civil Air Regulations. In almost half the cases, a waiver was granted.

This study illustrates the uniform manner in which the procedures traditionally observed by the Board and the Administrator have, in the past, operated to insure safety in air transportation while at the same time preserving the rights of individual airmen. The Administrator's action respecting pilots who have reached the age of 60 is an unwarranted and radical departure from such past practice.

The past practices referred to herein are the practices by which physical standards for airmen have been included only in Part 29 of the Regulations, and by which individuals have been afforded a hearing to defend their certificates from revocation. This practice should be given great weight in the interpretation of § 609 of the Act.

In the case of *United States* v. *Alabama Railroad Co.*, 142 U. S. 615 (1892), the Postmaster General's change in the previous interpretation of a statute dealing with the rates for mail carriage by railroads was challenged. Upholding the challenge, and declaring that the Postmaster General was bound by the practices resulting from prior uniform interpretation of the statute, the Supreme Court stated:

> "We think the contemporaneous interpretation thus given by the executive department of the government and continued for nine years through six different administrations of that department * * * should be considered as decisive in this suit. It is a settled doctrine of this Court that, in cases of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

And see:

United States v. *Atlantic Refining Co.*, 360 U. S. 19 (1959);
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294 (1933);
Hood v. *United States*, 256 F. 2d 522 (1958).

But the Court below indicated that to give individual airmen the right to hearing before their certificates were modified might require that some 18,000 pilot certificate holders be given individual hearings. See Appendix B, p. 71a. It is clear that this is not the case. Only those pilots who reached age sixty and had their license modified, revoked or suspended would be entitled to a hearing before the Administrator and to appeal to the Civil Aeronautics

Board. That this is a small number of people is apparent from the fact that by 1962 there would only be a total of about eighty active air carrier pilots in the above age sixty group according to the estimate of the Administrator (App. 255a). And see 49 U. S. C. § 1489. Furthermore, once the Administrator and the Civil Aeronautics Board had held the regulation valid, the ruling would be binding on the Administrator and the Board under the doctrine of *stare decisis* and if the validity of the regulation were later questioned by other airmen that issue could be disposed of summarily. See *Associated Industries of New York State, Inc.* v. *Ickes*, 134 F. 2d 694 (2d Cir.), *cert. granted*, 319 U. S. 739, *vacated as moot*, 320 U. S. 707 (1943).

Nor would the fact that the Administrator is required to grant each individual pilot who reaches the age of sixty a hearing before applying the regulation to him affect safety in air commerce. Section 609 permits the Administrator to modify, amend suspend, or revoke airman certificates without a hearing in cases of emergency and to continue his order in effect while an appeal to the Civil Aeronautics Board is pending.

Thus, there is no reason to believe that congress intended to deny hearings and the other procedural safeguards of § 609 of the Act to individual pilots the value of whose airman certificates is destroyed by action of the Administrator.

3. The Constitutional question presented by this case is of major importance in the field of public law. Petitioners ask this Court to determine whether, under the Due Process Clause of the Fifth Amendment to the Constitution, the Administrator may properly do away with the jobs and licenses of pilots by devising a method by which, without any notice or opportunity to be heard, pilots

are removed from their jobs and the value of their licenses is destroyed through the actions of private persons, their employers. While property rights of individuals in their licenses and in their jobs may properly be limited by considerations of public policy which, in extraordinary cases, require that observance of procedural safeguards be postponed, there is no warrant for a complete denial of notice and hearing to persons whose ability to practice their profession under a license granted by an agency of the United States is destroyed.

Nor is the action of the Administrator herein necessarily limited to pilots. If the Administrator has the power to destroy the value of pilot certificates by regulations that ostensibly operate on the pilots' employers without providing notice and hearing to the affected pilots, does he not have the power to destroy the value of a type certificate for a particular aircraft without notice and hearing by regulations that ostensibly operate on the potential purchasers of that aircraft? See Federal Aviation Act, §§ 603, 604(a), 49 U. S. C. §§ 1423, 1424(a).

On the effective date of the Administrator's action, some forty pilots were told by their employers that they could no longer pilot aircraft in air carrier operations (App. 224a, 255a). Each of these pilots possessed an Airline Transport Pilot Rating Certificate which qualified him under Civil Air Regulations to serve as pilot in command of an aircraft engaged in air carrier operations. See 14 C. F. R. § 21.1 *et seq.*, § 41.48. When, by reason of the Administrator's action, each of these pilots was removed from his job in air carrier operations on March 15, 1960, he was summarily deprived of (1) his license and (2) his right to continue in the practice of a lawful profession.

The Administrator labeled his action a "regulation," which he purported to promulgate under the rulemaking power delegated to him in the Federal Aviation Act of

1958. This label, however, is not controlling, since Courts will independently examine the effect of administrative action in determining what procedural safeguards must attend it. See *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 416 (1942); *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 408 (1940); *Powell* v. *United States*, 300 U. S. 276, 284-85 (1937); *Philadelphia Co.* v. *Securities Exchange Commission*, 164 F. 2d 889, 899 (D. C. Cir. 1947); DAVIS, ADMINISTRATIVE LAW, §§ 5.01, 5.06 (1958). Constitutional protections are operative, regardless of the form, label or language used by the Administrator to describe his action, if the effect of the administrative action is to limit or revoke outstanding licenses to practice a lawful profession. See *Federal Communications Commission* v. *National Broadcasting Co. (K. O. A.)*, 319 U. S. 239 (1943); *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 170 F. 2d 793 (D. C. Cir. 1948); *Civil Aeronautics Board* v. *American Air Transport*, 201 F. 2d 189 (D. C. Cir. 1952); *Philadelphia Co.* v. *Securities Exchange Commission, supra.*

It is highly unusual for licensees to be forced to resort to judicial proceedings to compel an administrative officer to recognize that as a matter of Due Process of Law, the revocation of a license and termination of the right to practice a lawful profession must be accompanied by notice and an opportunity for the licensee to be heard. The individual evidentiary hearing is invariably the *sine qua non* of the normal process of license modification or revocation. Agency "rules" or "regulations" are but one step in the accomplishment of the administrative purpose; the second step—*application* of the "rule" or "regulation" to *individuals* who fall within its general and prospective terms, awaits subsequent adjudicatory enforcement proceedings. In such circumstances, the individual hearing, required either by due process, by statute or both, is held as a matter of

course when the second of these two steps is sought to be accomplished. In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 418 (1942), this Court said:

> "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals which is binding only on the parties to the particular proceedings, a valid exercise of the rulemaking power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions on any particular individual."

Contrast the administrative determination the constitutionality of which is challenged in the instant case. This determination directed carriers to remove forty pilots from their jobs on a given date and thereafter to remove from their jobs other pilots at the time that they reached the age of 60. Thus, the carriers are used as the Administrator's enforcement officers, and the necessity for subsequent enforcement proceedings alluded to in the *C.B.S.* case, *supra*, is obviated. The Administrator does not dispute the fact that his determination is to be enforced against individual pilots, without giving them any notice or opportunity to be heard, and, in fact, no hearings have been held.

The content of due process varies with the circumstances of particular cases. This Court, in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 164 (1951) wrote:

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the officer or the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

It is appropriate to compare "the balance of hurt complained of and good accomplished" as a result of the Administrator's determination here. On the one hand, individual pilots have lost their Airline Transport Pilot Rating Certificates and the right to continue in the practice of their profession without any notice or hearing afforded to them. Other airman certificates which they possess have been substantially limited.

Upon an examination of the "good accomplished" by the Administrator's action, which denies these airmen an opportunity to be heard, there appears in the instant case no consideration of foreign policy such as was held to justify the denial of hearings to an applicant for a certificate of convenience and necessity in the case of *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948). Nor are there emergency wartime conditions such as were held to justify the denial of hearings to a landlord prior to the issuance of a price regulation in *Bowles* v. *Willingham*, 321 U. S. 503 (1944).

But the Administrator argues that the action taken against the pilots who were over age 60 was necessary to preserve safety in air carrier operations and to prevent an alleged hazard resulting from the possibility of sudden incapacitation of pilots in air carrier operations.

The decision of this Court in the *Joint Anti-Fascist Committee* case, *supra*, however, teaches that the available alternatives to the procedure that was followed bear significantly upon the meaning of due process in particular situations. Some of the available alternatives to the Administrator's action which would have provided affected pilots with an opportunity to be heard were:

1. The Administrator could have conducted more frequent and intensive examinations of the proficiency and physical condition of pilots who were over 60. Intensive

semi-annual examination of the physicial condition and proficiency of all pilots in air carrier operations are now required. See 14 C. F. R. §§ 40.302(b), 41.53.

2. The Administrator could have refused to renew the medical certificate of pilots over age 60.

3. The Administrator could have removed pilots who were over 60 from flight duty under Section 609 of the Federal Aviation Act.

Surely the Administrator could have used one of these methods, or another method that gave the forty pilots affected by his action an opportunity to be heard before their right to practice their profession was terminated.

Moreover, if the Administrator believed that an emergency existed, he could have invoked the emergency powers granted to him by § 609 of the Federal Aviation Act. See 49 U. S. C. § 1429; GELLHORN AND BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS, 774-75 (1954).

Ignoring his emergency powers under the statute, the Administrator chose instead to act in a manner that was both unconstitutional and unauthorized, and that permitted months to pass before his action became effective.

The substantial and irreparable injury which has been occasioned to the pilots who were 60 years old on the effective date of the Administrator's action could have been avoided without endangering public safety in any respect. The Administrator's choice of available alternatives is therefore a significant factor in arriving at the meaning of due process under the circumstances of this case. The Due Process Clause of the Fifth Amendment requires that each individual affected by the Administrator's action be accorded notice and the opportunity to be heard in defense of his job and his license. See, *e.g.*, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951);

Greene v. *McElroy*, 360 U. S. 474 (1959); *In re Carter*, 177 F. 2d 75 (D. C. Cir. 1949); *id.* 192 F. 2d 15 (D. C. 1951); *Parker* v. *Lester*, 112 F. Supp. 433 (D. C. Cal. 1953), *aff'd* 227 F. 2d 708 (9th Cir. 1955); *Civil Aeronautics Board* v. *American Air Transport*, 201 F. 2d 189 (D. C. Cir. 1952); *certificate dismissed*, 344 U. S. 4 (1952).

Considerations of substantial and irreparable injury to the licensee placed to one side, there are many other disadvantages which accrue from summary revocation of a license. Primarily, however honest the Administrator's intentions may be, his action may be misguided. It is not infrequent that the licensing authority itself is disposed to alter its initial determinations on the basis of evidence presented by a licensee at a hearing.

Furthermore, summary revocation forces individuals dissatisfied with the action of the licensing officials to utilize judicial procedure. Such judicial proceedings involve, in most cases, an inquiry into matters which might initially have been considered by the administrative officials themselves if an administrative hearing had been held.

It is for these reasons, *inter alia*, that the Courts have shaped the concept of due process into one which requires a hearing to precede administrative action that effects license revocation or property destruction. See *Civil Aeronautics Board* v. *American Air Transport*, 201 F. 2d 189 (D. C. Cir. 1952), *certificate dismissed*, 344 U. S. 4 (1952); *Philadelphia Co.* v. *SEC*, 175 F. 2d 808 (D. C. Cir. 1948), *vacated and dismissed as moot*, 337 U. S. 901 (1949); *and see* Administrative Procedure Act, §§ 2(d), 2(e), 5, 7, and 8, 5 U. S. C. §§ 1001(d), 1001(e), 1004, 1006 and 1007.

It is respectfully submitted that the constitutional question presented herein strongly merits the consideration of this Court.

4. This case also presents an important question concerning the interpretation and application of the Due Process Clause of the Fifth Amendment to the Constitution when administrative action is challenged as arbitrary and unreasonable.

The Court below stated that to sustain such a challenge it must be shown that the administrative agency had no reasonable basis for the exercise of its judgment; and cited *American Trucking Associations, Inc.* v. *United States*, 344 U. S. 298, 314 (1953); *Norman* v. *Baltimore & Ohio Railroad*, 294 U. S. 240 (1935) (App. B, p. 74a).

The instant case is one in which petitioner has shown that the Administrator's action was without a reasonable basis. It is respectfully submitted that if the power of the Court to overturn arbitrary administrative action is to be given any effect, it should be exercised in this case.

According to an affidavit of General Quesada, he based his age 60 action on the following:

> "A review of the available studies on the subject of the effect of aging by the medical staff of the FAA reveal that there is progressive deterioration of certain physiological and psychological functions with age and that sudden incapacitation due to such diseases as heart attack and stroke become more frequent with advancing years * * *. Moreover the sum of these studies led us to the conclusion that, unfortunately, medical science at the present time does not have any means of determining the physiologic age of any specific individual, nor is there any reliable method of predicting accurately the occurrence of sudden incapacitation due to heart attacks or strokes. This was illustrated significantly by a study of one large industrial group of employees under close medical supervision over an extended period. This study, which was amplified by discussions between physicians of this large industrial group and members of my medical staff, showed that

> approximately 85% of the persons who had a heart attack for the first time, had the attack within six months to a year after a thorough medical examination in which the individual had been found to be in a condition normal to his age and without any evidence to suggest the imminence of such an attack." (App. 256a)

Having concluded that, generally, as people grow older they are subject to more ills of the body than when they are younger the Administrator turned his attention to "the problem * * * [of] what maximum age limitation would provide a reasonable standard and would at the same time 'give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest.'" * * *" (App. 257a)

To solve this problem the Administrator used statistics showing the mortality rate from heart disease and the incidence of death from strokes, in all white males in the United States (App. 257a-258a). All the statistics relied upon by the Administrator were based on samples that consisted of people who were "in a condition normal to * * * (their) age" (App. 231a, 256a, 257a-258a).

But this sample does not have any relevance to the airmen affected by the Administrator's action that is challenged herein. In order to pilot aircraft in air commerce a pilot must have an Airline Transport Pilot Rating. See 14 C. F. R. § 41.48(a). To secure such a rating a pilot must "meet the physical standards of the first class prescribed in Part 29 of this subchapter." 14 C. F. R. § 21.14. These physical standards do not make any allowance for the "condition normal" to the age of the pilot. They are fixed standards of eyesight, hearing, general physical condition, blood pressure, circulatory efficiency, and the nervous system. For example, the physical standards of the first class for airmen requires:

"(c) *General physical condition.* (1) Applicant shall have no organic or functional disease or structural defect or limitation which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade of airman certificate held or sought.

(2) Unless the adjusted maximum readings apply, applicant's reclining blood pressure shall not exceed the maximum readings for his age group, as indicated in the table in this subparagraph. The adjusted maximum readings shall apply to any applicant, age 30 years or more, whose reclining blood pressure exceeds the maximum readings for his age group and whose cardiac and kidney conditions, after complete cardiovascular examination, are shown to be normal.

Age group	Maximum readings (reclining blood pressure in mm.) Systolic	Diastolic	Adjusted maximum (reclining blood pressure in mm.) Systolic	Diastolic
20-29	140	88	—	—
30-39	145	92	155	98
40-49	155	96	165	100
50 and over ...	160	98	170	100

"(3) Applicants 40 years of age or over shall demonstrate a degree of circulatory efficiency compatible with the safe operation of aircraft at high altitudes." 14 C. F. R. § 29.2.

The pilot engaged in air carrier operations is examined every six months to determine whether he meets these fixed physical standards (14 C. F. R. § 21.40(b)). It is therefore clear that a sample based on all white males in the United States and on persons "found to be in a condition normal to * * * (their) age" is an arbitrary and unreasonable sample by which to set standards for pilots of aircraft in air commerce. In addition to meeting fixed physical standards, such pilots undergo proficiency tests

every six months. See 14 C. F. R. §§ 40.302(b), 40.153. And the Administrator has the statutory power to re-examine any airman at any time he sees fit. 49 U. S. C. § 1429.

Here the Administrator admits that accident reports do not provide any significant data on the effects of age as a causal factor of accidents (App. 255a). Thus, no relationship has been established between pilot age and hazards to safety in air transportation.

As was pointed out in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 163 (1951), "the available alternatives to the procedure that was followed" should be considered in determining whether administrative action violates due process. As has been shown above, pages 31-32, the available alternatives to the Administrator's action in barring all pilots above the age of 60 from practicing their profession in air commerce would have satisfied all safety needs. Indeed, the feasibility of the use of these available alternatives is indicated by the following recent newspaper report:

> "U. S. May Let Pilots Fly After Age of 60
>
> Special to The New York Times
>
> Los Angeles, May 2—
>
> Projects being conducted by the Federal Aviation Agency's Bureau of Aviation Medicine may permit commercial airline pilots to fly after they reach 60 years of age and may also make electrocardiograms mandatory for all civilian pilots at regular intervals.
>
> This was disclosed yesterday by Dr. Frank K. Raymond of Los Angeles, the agency's Western regional flight surgeon, in an interview at the opening of a three-day seminar for seventy aviation medical examiners at the Biltmore Hotel.
>
> 'Commercial pilots of 60 often have the bodily capabilities of men of 40, while some men of 40 age

faster and are in the same physical category of the normal man of 60,' Dr. Raymond said.

Studies of new medical standards for testing pilots, he said, may permit a man of 60 to continue flying, and disqualify some men in their forties because of premature aging.

Dr. Raymond said he favors annual or bi-annual electrocardiogram heart examinations for all classes of civilian pilots." *See New York Times, May 3, 1961, p. 75, col. 2.

It is therefore respectfully submitted that the Administrator's action herein was without any reasonable basis and in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue its writ of certiorari to review the decision below.

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Supplement A–1

Name	Case No. and/or Docket No.	Date of Order	Type of Physical Defect	Administrator's Action	Examiner's Recommendations	CAB Action	Was Opportunity for Administrative Hearing Granted?	Was Waiver Granted?
Hooks	214	7/21/39	arm and leg amputee	cert. den.**	affirmed	affirmed	yes	no
Kemper	209	7/21/39	one eye blind	cert. den.	affirmed	affirmed	yes	no
Shields	210	7/21/39	leg amputee	cert. den.	reversed	affirmed	yes	yes
Swank	213	7/21/39	leg amputee	cert. den.	affirmed	affirmed	yes	no
Rinehart	212	8/18/39	defective vision	cert. den.	affirmed	affirmed	yes	no
Germain	208	8/25/39	leg amputee	cert. den.	reversed	affirmed	yes	yes
Wardlow	211	9/26/39	arm amputee	cert. den.	affirmed	affirmed	yes	no
Shreve	240	10/20/39	leg amputee	cert. den.	reversed	affirmed	yes	yes
Vautrin	304	10/20/39	defective vision	cert. den.	reversed	affirmed	yes	yes
Ricci	239	10/24/39	arm amputee	cert. den.	affirmed	affirmed	yes	no
Schulenberger	241	10/24/39	atrophy of leg	cert. den.	affirmed	affirmed	yes	no
Swanson	218	12/5/39	leg amputee	cert. den.	reversed	affirmed	yes	yes
Iseli	SR-40	6/14/40	epilepsy	cert. den.	affirmed	affirmed	yes	no
Berrien	SR-64	8/21/41	defective vision	cert. den.	affirmed	affirmed	yes	no
London	SR-167	1/6/42	defective vision	cert. den.	reversed	reversed	yes	no
P. D. C.*	SR-435	10/16/42	epilepsy	cert. den.	affirmed	affirmed	yes	no
P. D. C.	SR-438	1/8/43	diabetes	cert. den.	reversed	reversed	yes	no
P. D. C.	SR-538	5/28/43	diabetes	cert. den.	affirmed	affirmed	yes	no
E. C. MacDonough	SR-589	9/22/43	defective vision	cert. den.	reversed	affirmed	yes	yes
J. H. Flick	SR-616	5/3/44	defective vision	cert. den.	——	reversed	yes	Administrator's complaint dismissed
C. H. Hicks	SR-821	5/29/44	drug addiction	cert. den.	——	affirmed	yes	no
Malcolm Riess	SR-881	6/12/44	defective vision	cert. den.	——	affirmed	yes	no
W. N. Murrah	SR-806	7/7/44	defective hearing	cert. den.	affirmed	reversed	yes	yes
K. K. Noble	SR-870	7/19/44	ear disease	cert. den.	——	affirmed	yes	no
P. D. C.	ord. #3192	10/10/44	hypertension and sinus	cert. den.	——	affirmed	yes	no

* P. D. C.—Physical Disability Case.

** cert. den. denotes denial, amendment, modification, revocation or suspension of airman certificate.

Supplement A–2

Name	Case No. and/or Docket No.	Date of Order	Type of Physical Defect	Administrator's Action	Examiner's Recommendations	CAB Action	Was Opportunity for Administrative Hearing Granted?	Was Waiver Granted?
P. D. C.	not numbered	1/12/45	colostomy	cert. den.	affirmed	affirmed	yes	no
P. D. C.	ord. #3652	5/8/45	ear disease	cert. den.	reversed	affirmed	yes	yes
P. D. C.	ord. #3689	5/18/45	nervousness	cert. den.	affirmed	reversed	yes	yes
P. D. C.	ord. #3702	5/22/45	coronary	cert. den.	affirmed	affirmed	yes	no
P. D. C.	ord. #3717	5/29/45	purpora hemorrhagica	cert. den.	reversed	affirmed	yes	yes
P. D. C.	ord. #3753	6/15/45	duodenal ulcer	cert. den.	reversed	affirmed	yes	yes
P. D. C.	ord. #3752	6/15/45	epilepsy	cert. den.	affirmed	affirmed	yes	no
P. D. C.	ord. #3777	6/27/45	asthma	cert. den.	reversed	affirmed	yes	yes
P. D. C.	ord. #3804	7/3/45	diabetes	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #3816	7/6/45	defective vision	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #3846	7/17/45	quiescent tuberculosis	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #3859	7/20/45	former seizures and unconsciousness	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #3911	8/3/45	high blood pressure	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #3912	8/3/45	asthma	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #3929	8/8/45	scoliosis, collapsed lung, et al.	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #4012	8/31/45	ear disease	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #4046	9/18/45	osteomyelitis	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #4300	12/11/45	Intraventricular sceptum	cert. den.	——	reversed	yes	yes
P. D. C.	ord. #4691	4/24/46	chronic mastoiditic	cert. den.	——	reversed	yes	yes
I. E. Swain	ord. #4903	6/19/46	convulsive seizures	cert. den.	——	affirmed	yes	no
W. H. Dickerson	ord. #4954	7/9/46	influence of sulfa drugs	cert. den.	——	reversed	yes	Administrator's complaint dismissed
P. D. C.	S-173	8/13/48	diabetes	cert. den.	reversed	reversed	yes	no
P. D. C.	S-178	10/6/48	personality abnormality	cert. den.	reversed	reversed	yes	no
P. D. C.	S-213	1/24/49	myasthenia gravis	cert. den.	affirmed	affirmed	yes	no
P. D. C.	S-250	6/28/49	diabetes	cert. den.	affirmed	reversed	yes	yes
P. D. C.	S-252	7/8/49	mental & nervous disease	cert. den.	affirmed	affirmed	yes	no

Name
P. D. C.
P. D. C.
E. J. Huxtable, Jr
J. D. Lindsay
C. W. Langille
D. W. Miller
W. H. Hirschaut
M. G. Grigsby
J. H. Greene
G. F. Hall
P. D. C.
P. D. C.
P. D. C.
Erwin J. Ring
Harry F. Schaettl
James M. Cowart
Isiah R. Sallidav
Ross Briegleb
C. L. Pangborn
P. L. Fallack
C. J. Oryehowski
Walter Steiger
Merrill Ericson

Supplement A–3

Name	Case No. and/or Docket No.	Date of Order	Type of Physical Defect	Administrator's Action	Examiner's Recommendations	CAB Action	Was Opportunity for Administrative Hearing Granted?	Was Waiver Granted?
P. D. C.	S-253	7/12/49	mental incompetence	cert. den.	affirmed	affirmed	yes	no
P. D. C.	S-254	7/15/49	ductus arteriousus	cert. den.	affirmed	reversed	yes	yes
E. J. Huxtable, Jr.	S-291	11/14/49	psychosis	cert. den.	affirmed	affirmed	yes	no
J. D. Lindsay	S-314	2/20/50	asthma and hayfever	cert. den.	reversed	affirmed	yes	yes
C. W. Langille	S-319	3/13/50	systolic heart murmer	cert. den.	affirmed	affirmed	yes	no
D. W. Miller	S-357	8/1/50	seizures	cert. den.	reversed	affirmed	yes	Administrator's complaint dismissed
W. H. Hirschaut	S-369	10/2/50	heart disease	cert. den.	affirmed	affirmed	yes	no
M. G. Grigsby	S-381	10/31/50	abnormality of personality	cert. den.	affirmed	affirmed	yes	no
J. H. Greene	S-399	3/23/51	thromboangitis obliterans	cert. den.	affirmed	remanded	yes	——
G. F. Hall	S-419	6/6/51	mental disease	cert. den.	reversed	affirmed	yes	yes
P. D. C.	S-453	10/11/51	diabetes	cert. den.	affirmed	reversed	yes	yes
P. D. C.	S-475	3/5/52	mental disease	cert. den.	reversed	affirmed	yes	Administrator complaint dismissed
P. D. C.	S-476	3/5/52	mental disease	cert. den.	affirmed	reversed	yes	yes
Erwin J. Ring	S-632	8/3/54	diabetes	cert. den.	reversed	affirmed	yes	yes
Harry F. Schaettle	S-656	12/17/54	healed myocard inf.	cert. den.	affirmed	affirmed	yes	no
James M. Cowart	S-659	12/21/54	mental	cert. den.	reversed	affirmed	yes	yes
Isiah R. Salliday	S-729	4/2/56	coronary arterio-sclerosis	cert. den.	affirmed	affirmed	yes	no
Ross Briegleb	S-730	4/6/56	age 17	cert. den.	——	reversed	yes	yes
C. L. Pangborn	S-731	4/13/56	healed heart condition	cert. den.	affirmed	reversed	yes	yes
R. L. Fallack	S-740	5/28/56	age 16	cert. den.	——	affirmed	yes	no
C. J. Oryehowski	S-755	8/3/56	heart disease	cert. den.	affirmed	reversed	yes	yes
Walter Steiges	S-791	3/21/57	poor eyesight	Administrator refused waiver	affirmed	reversed	yes	yes
Merrill Ericson	S-807	6/6/57	diabetes	cert. den. (limited cert. granted)	affirmed	affirmed	yes	yes

Supplement A–4

Name	Case No. and/or Docket No.	Date of Order	Type of Physical Defect	Administrator's Action	Examiner's Recommendations	CAB Action	Was Opportunity for Administrative Hearing Granted?	Was Waiver Granted?
James M. Cowart	S-827	9/9/57	mental	cert. den.	——	remanded	yes	——
Frank W. Casey	S-828	9/9/57	schizophrenia	cert. den.	——	remanded	yes	——
Herman Schram	S-843	11/15/57	manic depressive psychotic	cert. den.	reversed	remanded	yes	——
John Doe	S-846	12/11/57	mental	cert. den.	affirmed	affirmed	yes	no
Denford D. Finke	S-864	4/1/58	age 16	cert. den.	——	affirmed	yes	no
J. K. Bates, et al.	21 cases S-866	4/10/58	——	cert. den.	——	remanded	yes	——
Russel H. Paschke	S-894	7/2/58	mental	cert. den.	reversed	affirmed	yes	yes
Louis L. Arnold	S-898	7/9/58	mental	cert. den.	reversed	affirmed	yes	yes
J. K. Bates, et al.	21 cases S-901	7/17/58	diabetes and heart	Administrator's petition for stay of CAB remand denied.				
Wm. R. Bernard	S-921	9/18/58	age 16	cert. den.	——	affirmed	yes	no
Anthony T. Milazzo	S-931	10/24/58	deaf mute	cert. den.	——	reversed	yes	yes
Fred A. Pharis	S-938	11/17/58	age 14	cert. den.	——	affirmed	yes	no
Frank W. Casey	S-939	12/4/58	mental	Request to reopen by Casey and Administrator after cert. den. Board asks for written reasons.				
Lyn B. Haggins	S-946	12/30/58	diabetes	cert. den.	reversed	affirmed	yes	yes
Eugene J. M. Lunch	S-947	12/30/58	diabetes	cert. den.	reversed	affirmed	yes	yes
Cecil C. Curtis	S-948	12/30/58	diabetes	cert. den.	reversed	affirmed	yes	yes
Billy N. Gray	S-949	12/30/58	myocardial infarction	cert. den.	reversed	affirmed	yes	yes
Isidore H. Langenderfer	S-950	12/30/58	myocardial infarction	cert. den.	reversed	affirmed	yes	yes
Oren J. Casey	S-953	12/30/58	diabetes	cert. den.	reversed	affirmed	yes	yes
Albert H. Stronstoiff	S-951	12/2/59	myocardial infarction	cert. den.	affirmed	reversed	yes	yes
Stanley J. Portman	S-967	3/3/59	diabetes	cert. den.	reversed	affirmed	yes	yes
Eugene M. Quimby	S-968	3/3/59	diabetes	cert. den.	reversed	affirmed	yes	yes
Frank W. Casey	S-980	4/24/59	Schizophrenia	cert. den. (limited cert. granted)	affirmed	affirmed	yes	yes
Jas. R. Whitman, Jr.	S-985	5/11/59	diabetes	cert. den.	reversed	affirmed	yes	yes
Frederick K. Ake	S-988	5/15/59	diabetes	cert. den.	reversed	affirmed	yes	yes
Henry H. Crodian	S-994	6/8/59	diabetes	cert. den.	reversed	reversed	yes	no

Supplement A–5

Name	Case No. and/or Docket No.	Date of Order	Type of Physical Defect	Administrator's Action	Examiner's Recommendations	CAB Action	Hearing Granted? Was Opportunity for Administrative	Was Waiver Granted?
J. K. Bates	S-997	6/19/59	heart disease	cert. den.	reversed	affirmed	yes	yes
Daniel H. H. Casebeer	S-999	6/23/59	heart disease	cert. den.	affirmed	affirmed	yes	no
Marshal D. Hendrickson	S-1003	6/24/59	diabetes	cert. den.	reversed	affirmed	yes	yes
Jas. R. Whitman, Jr.	S-1015	8/26/59	diabetes	cert. den.	——	affirmed	yes	no
George F. Baker	S-1024	11/18/59	Effective October 15, 1959, the Administrator amended Part 29, by modifying the regulations to provide that a medical history or a clinical diagnosis of certain specified diseases or conditions (diabetes, myocardial infarction, coronary heart disease) shall be disqualifying for airman medical certificates of any type. Subjects in case #S-1024 all were denied certificates by the Administrator prior to October 15, 1959 because of a medical history or clinical diagnosis of one of the three specified maladies. The Civil Aeronautics Board Examiner granted a limited certificate to all of these individuals, in accordance with the regulations in effect prior to October 15, 1959. The Administrator appealed to the Board from the decision of the Examiner granting said limited certificates, and the Board, on November 18, 1959, remanded these cases to the Examiner for reconsideration in the light of the amendments to Part 29. No final decision had been rendered at the time this study was prepared.					
Ernestine Bienman	S-1024	11/18/59						
Owen L. Butler	S-1024	11/18/59						
Jas. E. Eaton	S-1024	11/18/59						
A. C. Holder	S-1024	11/18/59						
Wm. W. Horton, Jr.	S-1024	11/18/59						
Silas R. Langlois	S-1024	11/18/59						
Ralph B. Muse	S-1024	11/18/59						
Ralph C. Parker	S-1024	11/18/59						
H. S. Seabrook	S-1024	11/18/59						
Robert E. Tramp	S-1024	11/18/59						

Appendix A

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

ADMINISTRATIVE PROCEDURE ACT *

60 Stat. 237 *et seq.*; 5 U. S. C. 1001 *et seq.*

SEC. 2. (c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval,

* As of February 15, 1959.

registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

* * *

RULE MAKING

SEC. 4. [*60 Stat. 238; 5 U. S. C. 1003*] Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance

with law and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Appendix A

ADJUDICATION

SEC. 5. [*60 Stat. 239; 5 U. S. C. 1004*] In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held, and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become un-

available to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

* * *

HEARINGS

SEC. 7. [*60 Stat. 241; 5 U. S. C. 1006*] In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or

designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommended decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or

determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

* * *

SANCTIONS AND POWERS

SEC. 9. [*60 Stat. 242; 5 U. S. C. 1008*] In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) LICENSES.—In any case in which application is made for a license required by law and agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such actions shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve com-

pliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

SEC. 10 [*60 Stat. 243; 5 U. S. C. 1009*] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the

agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * *

Appendix A

FEDERAL AVIATION ACT OF 1958 *

72 Stat. 737 *et seq.*; 49 U. S. C. 1301 *et seq.*

Other Powers and Duties of Administrator

General

Sec. 313. [*72 Stat. 752, 49 U. S. C. 1354*] (a) The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

* * *

TITLE VI—SAFETY REGULATION OF CIVIL AERONAUTICS

General Safety Powers and Duties

Minimum Standards; Rules and Regulations

Sec. 601. [*72 Stat. 775, 49 U.S.C. 1421*] (a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and

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* As of February 15, 1959.

(C) in the discretion of the Administrator, the periods for and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Needs of Service To Be Considered; Classification of Standards, etc.

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this title, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transporta-

tion has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this Act in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this title.

Exemptions

(c) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this title if he finds that such action would be in the public interest.

AIRMAN CERTIFICATES

Power to Issue Certificate

SEC. 602. [*72 Stat. 776, 49 U.S.C. 1422*] (a) The Administrator is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

Issuance of Certificate

(b) Any person may file with the Administrator an application for an airman certificate. If the Administrator finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Administrator may determine to be necessary to assure safety in air commerce. Except in the case of persons whose certificates

are, at the time of denial, under order of suspension or whose certificates have been revoked within one year of the date of such denial, any person whose application for the issuance or renewal of an airman certificate is denied may file with the Board a petition for review of the Administrator's action. The Board shall thereupon assign such petition for hearing at a place convenient to the applicant's place of residence or employment. In the conduct of such hearing and in determining whether the airman meets the pertinent rules, regulations, or standards, the Board shall not be bound by findings of fact of the Administrator. At the conclusion of such hearing, the Board shall issue its decision as to whether the airman meets the pertinent rules, regulations, and standards and the Administrator shall be bound by such decision; *Provided*, That the Administrator may, in his discretion, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments.

Form and Recording of Certificate

(c) Each certificate shall be numbered and recorded by the Administrator; shall state the name and address of, and contain a description of, the person to whom the certificate is issued; and shall be entitled with the designation of the class covered thereby. Certificates issued to all pilots serving in scheduled air transportation shall be designated "airline transport pilot" of the proper class.

AIRCRAFT CERTIFICATES

Type Certificates

SEC. 603. [*72 Stat. 776, 49 U. S. C. 1423*] (a)(1) The Administrator is empowered to issue type certificates for aircraft, aircraft engines, and propellers; to specify in

regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

(2). Any interested person may file with the Administrator an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Administrator shall make an investigation thereof and may hold hearings thereon. The Administrator shall make, or require the applicant to make, such tests during manufacture and upon completion as the Administrator deems reasonably necessary in the interest of safety, including flight tests and tests of raw materials or any part or appurtenances of such aircraft, aircraft engine, propeller, or appliance. If the Administrator finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Administrator, he shall issue a type certificate therefor. The Administrator may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Administrator may record upon any certificate issued for aircraft, aircraft engines, or propellers, a numerical determination of all of the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

Production Certificate

(b) Upon application, and if it satisfactorily appears to the Administrator that duplicates of any aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued will conform to such certificate, the Administrator shall issue a production certificate authorizing the production of duplicates of such aircraft, aircraft en-

gines, propellers, or appliances. The Administrator shall make such inspection and may require such tests of any aircraft, aircraft engine, propeller, or appliance manufactured under a production certificate as may be necessary to assure manufacture of each unit in conformity with the type certificate or any amendment or modification thereof. The Administrator may prescribe in any such production certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety.

Airworthiness Certificate

(c) The registered owner of any aircraft may file with the Administrator an application for an airworthiness certificate for such aircraft. If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each such certificate shall be registered by the Administrator and shall set forth such information as the Administrator may deem advisable. The certificate number, or such other individual designation as may be required by the Administrator, shall be displayed upon each aircraft in accordance with regulations prescribed by the Administrator.

Air Carrier Operating Certificates

Power to Issue

Sec. 604. [*72 Stat. 778, 49 U. S. C. 1424*] (a) The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

Issuance

(b) Any person desiring to operate as an air carrier may file with the Administrator an application for an air carrier operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder, he shall issue an air carrier operating certificate to such person. Each air carrier operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation, and shall specify the points to and from which, and the Federal airways over which, such person is authorized to operate as an air carrier under an air carrier operating certificate.

MAINTENANCE OF EQUIPMENT IN AIR TRANSPORTATION

Duty of Carriers and Airmen

SEC. 605. [*72 Stat. 778, 49 U. S. C. 1425*] (a) It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul, and repair of all equipment used in air transportation as may be required by this Act, or the orders, rules, and regulations of the Administrator issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply with the requirements of this Act relating thereto, and the orders, rules, and regulations issued thereunder.

Inspection

(b) The Administrator shall employ inspectors who shall be charged with the duty (1) of making such inspections of aircraft, aircraft engines, propellers, and appliances designed for use in air transportation, during manufacture, and while used by an air carrier in air transporta-

tion, as may be necessary to enable the Administrator to determin that such aircraft, aircraft engines, propellers, and appliances are in safe condition and are properly maintained for operation in air transportation; and (2) of advising and cooperating with each air carrier in the inspection and maintenance thereof by the air carrier. Whenever any inspector shall, in the performance of his duty, find that any aircraft, aircraft engine, propeller, or appliance, used or intended to be used by any air carrier in air transportation, is not in condition for safe operation, he shall so notify the carrier, in such form and manner as the Administrator may prescribe; and, for a period of five days thereafter, such aircraft, aircraft engine, propeller, or appliance shall not be used in air transportation, or in such manner as to endanger air transportation, unless found by the Administrator or his inspector to be in condition for safe operation.

AIR NAVIGATION FACILITY RATING

SEC. 606. [*72 Stat. 779, 49 U. S. C. 1426*] The Administrator is empowered to inspect, classify, and rate any air navigation facility available for the use of civil aircraft, as to its suitability for such use. The Administrator is empowered to issue a certificate for any such air navigation facility.

AIR AGENCY RATING

SEC. 607. [*72 Stat. 779, 49 U. S. C. 1427*] The Administrafor is empowered to provide for the examination and rating of (1) civilian schools giving instruction in flying or in the repair, alteration, maintenance, and overhaul of aircraft, aircraft engines, propellers, and appliances, as to the adequacy of the course of instruction, the suitability and airworthiness of the equipment, and the competency of the instructors; (2) repair stations or shops for the repair, alteration, maintenance, and overhaul of aircraft, aircraft

engines, propellers, or appliances, as to the adequacy and suitability of the equipment, facilities, and materials for, and methods of, repair, alteration, maintenance, and overhaul of aircraft, aircraft engines, propellers, and appliances, and the competency of those engaged in the work or giving any instruction therein; and (3) such other air agencies as may, in his opinion, be necessary in the interest of the public. The Administrator is empowered to issue certificates for such schools, repair stations, and other agencies.

FORM OF APPLICATIONS

SEC. 608. [*72 Stat. 779, 49 U. S. C. 1428*] Applications for certificates under this title shall be in such form, contain such information, and be filed and served in such manner as the Administrator may prescribe, and shall be under oath whenever the Adminstrator so requires.

AMENDMENT, SUSPENSION, AND REVOCATION OF CERTIFICATES

SEC. 609. [*72 Stat. 779, 49 U. S. C. 1429*] The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of

such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

PROHIBITIONS

Violations of Title

SEC. 610. [*72 Stat. 780, 49 U. S. C. 1430*] (a) It shall be unlawful—

(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to

serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this title;

(3) For any person to employ for service in connection with any civil aircraft used in air commerce an airman who does not have an airman certificate authorizing him to serve in the capacity for which he is employed;

(4) For any person to operate as an air carrier without an air carrier operating certificate, or in violation of the terms of any such certificate;

(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this title; and

(6) For any person to operate a seaplane or other aircraft of United States registry upon the high seas in contravention of the regulations proclaimed by the President pursuant to section 1 of the Act entitled "An Act to authorize the President to proclaim regulations for preventing collisions at sea", approved October 11, 1951 (Public Law 172, Eighty-second Congress; 65 Stat. 406); and

(7) For any person holding an air agency or production certificate to violate any term, condition, or limitation thereof, or to violate any order, rule, or regulation under this title relating to the holder of such certificate.

Exemption of Foreign Aircraft and Airmen

(b) Foreign aircraft and airmen serving in connection therewith may, except with respect to the observance by such airmen of the air traffic rules, be exempted from the provisions of subsection (a) of this section, to the extent, and upon such terms and conditions, as may be prescribed by the Administrator as being in the interest of the public.

* * *

Appendix A

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

SEC. 1006. [*72 Stat. 795, 49 U. S. C. 1486*] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; Filing of Transcript

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

Power of Court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further pro-

ceedings by the Board or Administrator. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate; *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Board or Administrator.

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

* * *

CIVIL AERONAUTICS ACT OF 1938

AMENDMENT, SUSPENSION, AND REVOCATION OF CERTIFICATES

SEC. 609. [*52 Stat. 1011*] The Authority [Administrator] may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency; may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or [the Board may] suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or [the Board] may revoke, in whole or in part, any such

certificate for any cause which, at the time of revocation, would justify the Authority [administrator] in refusing to issue to the holder of such certificate a like certificate. In cases of emergency, any such certificate may be suspended, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing. The Authority shall immediately give notice of such suspsnsion to the holder of such certificate and shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days.

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CODE OF FEDERAL REGULATIONS *

14 C. F. R. Part 20

Pilot and Instructor Certificates

Applicability and Definitions

§ 20.1. *Applicability of this part.* This part prescribes standards for the issuance of student, private, and commercial pilot and flight instructor certificates and aircraft and instrument ratings. Regulations for the issuance of air line transport and lighter-than-air pilot certificates are specified in Parts 21 and 22, respectively, of this subchapter.

• • •

General

§ 20.10 *Application and issuance.* (a) An application for a pilot certificate or any rating shall be made on a form furnished by the Administrator.

(b) A student, private, or commercial pilot or flight instructor certificate with appropriate aircraft ratings shall

* As of December 31, 1956, except where otherwise expressly indicated.

be issued by the Administrator to an applicant who meets the applicable requirements. Additional aircraft category, class, and type, and instrument ratings for which an applicant has been found qualified shall be issued in connection with a pilot or flight instructor certificate. A pilot certificate with appropriate limitations shall be issued to an applicant who cannot comply with all the prescribed skill requirements due to the special characteristics of the aircraft used in the flight test if he meets all other requirements for the issuance of the certificate sought.

(c) An applicant for a pilot certificate who presents a medical certificate issued under the physical-deficiencies provision of Part 29 of this subchapter and meets all other requirements for the issuance of the certificate sought shall be issued a pilot certificate containing such operating limitations as the Administrator may find are commensurate with the physical deficiencies entered on his medical certificate.

(d) The prescribed examinations and tests shall be given by a person designated by the Administrator.

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STUDENT

§ 20.20 *Age.* 16 years is the minimum age for the issuance of a student pilot certificate. If an applicant is less than 21 years of age and is not a regular or reserve member of the armed forces of the United States or enrolled in an established ROTC or other training program of such armed forces at the time of making application, he shall submit with his application the written consent of either parent or of his legal or natural guardian.

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§ 20.22 *Physical standards.* An applicant shall hold at least a valid third class medical certificate issued in accordance with the physical standards prescribed in Part 29 of this subchapter.

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Appendix A

PRIVATE

§ 20.30 *Age.* 17 years is the minimum age for the issuance of a private pilot certificate.

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§ 20.32 *Physical standards.* An applicant shall hold at least a valid third class medical certificate issued in accordance with the physical standards prescribed in Part 29 of this subchapter.

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COMMERCIAL

§ 20.40 *Age.* 18 years is the minimum age for the issuance of a commercial pilot certificate.

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§ 20.42 *Physical standards.* An applicant shall hold at least a valid second class medical certificate issued in accordance with the physical standards prescribed in Part 29 of this subchapter.

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14 C. F. R. PART 21

AIRLINE TRANSPORT PILOT RATING

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§ 21.1 *Provision for issuance.* Pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended, empowering the Administrator of Civil Aeronautics to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft, and requiring the Civil Aeronautics Board to prescribe such reasonable rules and regulations governing practices, methods, and procedures as the Board may find necessary to provide adequately for safety in air commerce, airline transport pilots will be rated as to

competence in accordance with the provisions of the regulations in this part.

§ 21.5 *Definitions.* As used in this part, terms are defined as follows:

Category. A category is a broad classification of aircraft with distinct configuration and operating characteristics such as airplane, rotorcraft, or glider.

Class. A class is a classification of aircraft within a category differentiating between single-engine and multi-engine and land and water configurations.

Flight time. Flight time is the total time from the moment the aircraft first moves under its own power for the purpose of flight until the moment it comes to rest at the end of the flight (block to block).

Maximum certificated take-off weight. Maximum certificated take-off weight is the maximum take-off weight authorized by the terms of the aircraft airworthiness certificate.

Night. Night is the time between the ending of evening civil twilight and the beginning of morning civil twilight as published in the American Air Almanac converted to local time for the locality concerned.

NOTE: The American Air Almanac containing the ending of evening twilight and the beginning of morning twilight tables may be obtained from the Superintendent of Documents, Government Printing Office, Washington 25, D. C. Information is also available concerning such tables in the offices of the Civil Aeronautics Administration or the United States Weather Bureau.

Pilot in command. A pilot in command is the pilot responsible for the operation and safety of the aircraft during the time defined as flight time.

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Solo flight time. Solo flight time is flight time during which the pilot is the sole occupant of the aircraft.

Type. Type is a specific classification of aircraft having the same basic design including all modifications thereto except those modifications which result in a change in handling or flight characteristics.

MINIMUM REQUIREMENTS

§ 21.9 *Eligibility.* To be eligible for an airline transport pilot competency rating, an applicant shall comply with the minimum requirements set forth in §§ 21.10-21.18.

§ 21.10 *Age.* 23 years is the minimum age for the issuance of an airline transport pilot rating.

§ 21.11 *Character.* Applicant shall be of good moral character.

§ 21.12 *Citizenship.* An applicant for a pilot certificate with an airline transport pilot rating may be a citizen of any country or a person without nationality.

§ 21.13 *Education.* (a) Applicant shall be able to read, write, and understand the English language, and shall be able to speak the English language without accent or impediment of speech which would interfere with two-way radio conversation; and

(b) Shall be a high school graduate or what is deemed by the Administrator to be its equivalent from the applicant's showing of general experience and aeronautical experience, knowledge, and skill.

§ 21.14 *Physical condition.* Applicant shall meet the physical standards of the First Class prescribed in Part 29 of this subchapter.

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§ 21.15 *Aeronautical knowledge.* Applicant shall be familiar with and shall accomplish a satisfactory written examination on:

(a) The provisions of Parts 1, 21, 27, 40, and 60 of this subchapter, together with such parts of the provisions of Parts 4a and 4b of this subchapter as are pertinent to the operations of air carrier aircraft.

(b) The fundamentals of air navigation and the use of formulas and of instruments and other investigational aids, both in aircraft and on the ground, which are deemed necessary for the navigation of aircraft by instruments.

(c) The general system of weather collection and dissemination.

(d) Weather map, weather forecast, and weather sequence abbreviations, symbols, and nomenclature.

(e) Elementary meteorology, including modern knowledge of the cyclones as associated with fronts.

(f) Cloud forms.

(g) Department of Commerce Weather Bureau Circular N, Instructions for Airway Meteorological Service, and all amendments thereto.

(h) Weather conditions, including icing conditions and upper-air winds, affecting aeronautical activities.

(i) Air navigation facilities in use on the civil airways, including rotating beacons, course lights, radio ranges, and radio marker beacons.

(j) Data obtained from airplane weather observations and meteorological data reported from observations made by pilots engaged in air carrier flights.

(k) The influence of terrain upon meteorological conditions and developments, and the relation thereof to air carrier flight operations.

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(l) Radio communication procedure as applied to aircraft operation.

(m) The basic principles of loading and weight distribution and its effect on flight characteristics.

§ 21.15-1 *Written examination (CAA policies which apply to § 21.15)*—(a) *Eligibility.* The airline transport pilot rating written examination will be given to any person who meets the eligibility requirements of §§ 21.9 through 21.14 and 21.16.

(b) *Contents.* The examination consists of four sections: (1) Civil Air Regulations, (2) meteorology, (3) radio navigation, and (4) radio operations and procedures; each of which is graded separately. A minimum grade of 70 percent is required to pass each section.

(c) *Substitution of credit.* An applicant may be credited with the successful completion of the meteorology section of the airline transport pilot rating written examination if he possesses a currently valid flight navigator's certificate or an instrument rating or if, within the last 2 years he has successfully completed the meteorology section of either the flight navigator or instrument rating examination. An applicant may be credited with successful completion of the radio navigation section of the airline transport pilot examination if he possesses a currently valid flight navigator's certificate or if, within the last 2 years, he has successfully completed the air navigation section of the flight navigator examination. If, however, the applicant has previously taken the airline transport pilot examination and failed to pass these sections, he may not substitute such credit for the written examination.

(d) *Examination procedures.* The examination consisting of the four sections mentioned in paragraph (b) of this section should be completed within one 6-hour session, except that the supervising agent may, at his discretion

allow extra time in special circumstances. No examination may be started unless sufficient time remains to complete the examination before the end of regular office hours.

(e) *Report of grades.* A report of grades received, Form ACA-578A, will be mailed direct to the applicant. Form ACA-578A will be accepted within a period of 24 months from the date of the examination as evidence of the applicant's having successfully completed the knowledge requirements for an airline transport pilot rating. A Form ACA-578A, acceptable on September 1, 1956, will be accepted by the Administrator until September 1, 1958.

EXCEPTION: Form ACA-578A will be accepted by the Administrator from an applicant during the applicant's period of employment with an air carrier or operator, provided the applicant has been continuously employed since taking the examination, as a pilot with an air carrier or operator, and during this period of employment actively participates in a pilot training program conducted by the air carrier or operator.

§ 21.16 *Aeronautical experience.* An applicant for an airline transport pilot rating shall hold a valid commercial pilot rating, or equivalent as determined by the Administrator, and shall meet the following aeronautical experience requirements:

(a) Applicant shall have had at least 250 hours of flight time composed of time as pilot in command, or time as co-pilot actually performing the duties and functions of a pilot in command under the surveillance of the pilot in command, or any combination thereof. Of this time, at least 100 hours shall have been cross-country flight time, and at least 25 hours shall have been night flight time. Flight time shown in fulfillment of the requirements of this paragraph may also be used for the purposes of paragraph (b) of this section.

(b) Applicant shall have had at least 1,200 hours of flight time as pilot within the last 8 years, of which

(1) 5 hours shall have been had within 60 days immediately preceding the date of application;

(2) 500 hours shall have been cross-country flight time;

(3) 100 hours shall have been night flight time;

(4) 75 hours shall have been instrument time under actual or simulated instrument conditions of which not less than 50 hours shall have been in actual flight.

(c) An applicant who meets the requirements of paragraph (a) of this section with other than 250 hours of pilot-in-command time shall have his certificate appropriately endorsed by the Administrator in accordance with Article 39 of the Convention on International Civil Aviation. At such time as the holder of a certificate so endorsed submits reliable documentary evidence to the Administrator that he has met the requirements of paragraph (a) of this section, taking into account only time as pilot in command, he shall be reissued a certificate without such endorsement.

NOTE: By the terms of Article 40 of the Convention on International Civil Aviation, no person having a certificate endorsed in accordance with the foregoing provision may participate in international navigation as pilot in command except with the permission of the State or States whose territory is entered.

§ 21.16-1 *Aeronautical experience (CAA rules which apply to § 21.16).* (a) The following shall be considered to hold the equivalent of a United States Commercial Pilot Rating Certificate:

(1) Pilots of the U. S. armed services whose military experience qualifies them for commercial certificates under § 20.55 (b) of this subchapter.

(2) Holders of foreign airline transport pilot or commercial pilot licenses without limitations issued by member states of ICAO.

(b) The holding of the equivalent of a commercial pilot rating shall permit the holder thereof to meet the requirements of §§ 21.17 (a) (1) through (7) and 21.18 (b).

§ 21.16-2 *Evidence of flight experience* (*CAA policies which apply to § 21.16*). (a) Flight experience required by § 21.16 should be substantiated by a logbook maintained in accordance with the requirements of § 43.43 of this subchapter.

§ 21.16-3 *Copilot experience* (*CAA policies which apply to § 21.16. (a)*). A copilot employed by a certificated air carrier may credit "as copilot actually performing the duties and functions of a pilot-in-command under the surveillance of the pilot-in-command" that time during which he performs all the functions of the pilot-in-command [1] including landings and takeoffs, en route flying, low approaches, and ground functions.

(a) Flight time credited in this manner is subject to the provisions of § 43.44 (b) (2) of this subchapter.

(b) The actual flight time should be recorded and certified by the pilot-in-command under whose supervision the functions were accomplished.

§ 21.17 *Aeronautical skill.* (a) Applicant shall demonstrate satisfactorily his ability to pilot aircraft in normal

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[1] An air carrier should determine that a copilot has had sufficient time and experience and has demonstrated his ability to perform efficiently the duties of a copilot before permitting him to perform the functions of a pilot-in-command for the purpose of logging "pilot-in-command time."

take-offs, turns, landings, and the following maneuvers (the maneuvers in subparagraphs (6) and (7) of this paragraph shall be performed in an aircraft satisfactory to the examining inspector of the Administrator):

(1) From 3,500 feet, with engine throttled, a 360° turn and a landing in normal landing attitude.

(2) From 2,500 feet, with engine throttled, a 180° turn and a landing in normal landing attitude.

(3) A series of three shallow and three steep figure 8 turns and one 720° steep power turn in each direction. During these maneuvers, the pilot shall not gain or lose more than 200 feet of altitude.

(4) A spiral in one direction from 3,500 feet, or higher, with engiher throttled, and a landing in normal landing attitude.

(5) Subparagraphs (1) through (4) of this paragraph shall be applicable when the flight tests are conducted in aircraft of a gross weight in excess of 10,000 pounds: otherwise the pilot shall be required to demonstrate his aeronautical skill in accordance with § 20.45 of this subchapter.

(6) Emergency maneuvers such as simulated forced landings, spirals, side slips and climbing turns, and recovery from stalls, maneuvers in multiengine equipment with authorized load with one engine inoperative, if rating is sought on such equipment, and such other maneuvers as the examining inspector of the Administrator may deem necessary to demonstrate the competence of the applicant.

(7) A right-hand and a left-hand spin, each of at least two full turns, with not to exceed 10 degrees error.

NOTE: The requirements of subparagraphs (1)-(7) of this paragraphs and of § 21.18(b) may be met by the holding of a valid commercial rating.

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(b) Applicant shall accomplish satisfactorily a flight test, solely by instruments, with respect to the following:

(1) Straight level flight for a given period of time.

(2) Moderate banks during 180° and 360° turns in both directions.

(3) Minimum glides and maximum climbs, and approaches to stalled attitudes of flight.

(4) Climbing turns.

(5) Stalls, skids, slips and spirals, and banks in excess of 45°, and recovery from the same.

NOTE: The requirements of subparagraphs (1)-(5) of this paragraph may be met by the holding of a valid instrument rating.

(6) Such other maneuvers as the examining inspector deems necessary.

(7) A practical demonstration, while in flight or under simulated conditions, of estimating arrival time, taking into account speed, wind, and drift.

§ 21.17-1 *Aeronautical skill (CAA policies which apply to § 21.17).* (a) An applicant will satisfactorily demonstrate the following maneuvers to an Aviation Safety Agent or a designated airline transport pilot examiner by means of a flight check.[2] This flight check may not be taken until the written examination has been satisfactorily completed and the applicant has complied with the requirements of § 21.31.

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[2] The examiner or agent will determine the order in which the maneuvers are to be accomplished. See Appendix A for detailed information relating to the required maneuvers. Appendix A not filed with Federal Register Division.

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(b) The following list of maneuvers will be specifically required for airline transport rating in multiengine aircraft:

Equipment examination (oral).
Preflight check.
Taxiing, or sailing and docking.
Runups.
Takeoffs.
Climbs and climbing turns.[3]
Maneuvering at slow speed.
Approaches to stalls.
Airport traffic pattern.
Landing technique.
Cross-wind takeoff and landing.
Traffic control procedure.
Steep turns (instruments only).
Timed turns.[3]
Recovery from unusual attitudes.
Use of radio equipment.
Orientation.
Beam bracketing.
Cone (station) identification.
Instrument approach procedures.
Missed approach procedures.
Use of directional radio.
Rapid descent and pull-up.
Engine(s) out procedure.
Maneuvering with engine(s) out.
Maneuvering for landing at weather minimums.
Takeoff and landing with engine(s) failure.
Emergencies.
Smoothness and coordination.
Judgment.

[3] Not required if applicant holds instrument rating.

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(c) The following list of maneuvers will be specifically required for airline transport pilot rating in single-engine aircraft:

Equipment examination (oral).
Preflight check.
Taxiing, or sailing and docking.
Runup.
Takeoffs.
Climbs and climbing turns.[3]
Maneuvering at slow speed.
Stalls.
Airport traffic pattern.
Accuracy approaches and spot landings.
Landing technique.
Cross-wind takeoff and landing.
Traffic control procedures.
Steep turns (instrument only).
Timed turns.[3]
Recovery from unusual attitudes.
Use of radio equipment.
Orientation.
Beam bracketing.
Cone (station) identification.
Instrument approach procedures.
Missed approach procedures.
Use of directional radio.
Rapid descent and pull-up.
Maneuvering for landing at weather minimums.
Emergencies.
Smoothness and coordination.
Judgment.

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[3] Not required if applicant holds instrument rating.

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(d) The following list of maneuvers will be specifically required of ATR multiengine pilots who apply for additional type ratings:

Equipment examination (oral).
Preflight check.
Taxiing, or sailing and docking.
Runups.
Takeoffs.
Maneuvering at slow speed.
Approaches to stalls.
Airport traffic pattern.
Landing technique.
Cross-wind takeoff and landing.
Traffic control procedures.
Steep turns (instrument only).
Recovery from unusual attitudes.
Use of radio equipment.
Missed approach procedures.
Rapid descent and pull-up.
Engine(s) out procedure.
Maneuvering with engine(s) out.
Maneuvering for landing at weather minimums.
Takeoff and landing with engine(s) failure.
Emergencies.
Smoothness and coordination.
Judgment.

§ 21.18 *Radio skill.* (a) An applicant shall demonstrate his ability to interpret International Morse Code signals, and shall accomplish a satisfactory flight test in a hooded cockpit with respect to the following:

(1) Tuning radio.

(2) Orientation. Such orientation shall include the use of the radio direction finder with sufficient tests to determine the ability of the pilot to:

(i) Home on a radio station.

(ii) Determine whether the aircraft is heading toward or away from the station.

(iii) Obtain accurate fixes by the use of radio compass.

(3) Following radio range.

(4) Locating cone of silence.

(5) Letting-down-through on the range by the approved instrument approach procedure for the particular airport used in connection with the test.

(6) Such other maneuvers as the examining inspector deems necessary.

(b) Such maneuvers as are necessary to demonstrate competence to satisfactorily pilot an aircraft from either control seat. None of the maneuvers provided for in § 21.17 and this section shall be disregarded, but any such maneuver may be modified by the examining inspector of the Administrator to such extent as may be necessary for reasonable and safe operation of the aircraft used in the particular maneuver. Such inspector will report any such modification to the Administrator in writing.

AIRLINE TRANSPORT PILOT COMPETENCY CERTIFICATE

§ 21.20 *Aircraft rating.* The aircraft which the applicant is deemed competent to pilot shall be prescribed in his certificate by category and class, and type if the aircraft has a maximum certificated take-off weight of more than 12,500 lbs. and, in the case of unconventional airplanes, such description as is appropriate to define clearly the com-

petence of the applicant. Competence to pilot aircraft shall be demonstrated in aircraft of the category and class and, if appropriate, the type for which the rating is sought.

§ 21.20-1 *Aircraft rating (CAA policies which apply to § 21.20(a)).* Flight test maneuvers as outlined in § 21.17-1 (d) will be used in determining competency of airline transport pilots for aircraft ratings sought by them in accordance with this section.[4]

§ 21.21 *Application.* Application for an airline transport pilot certificate shall be made to the Administrator upon a form supplied for the purpose.

(a) *Application to amend.* When any change in an air line transport pilot competency rating is desired, the applicant shall file a written request therefor with the Administrator upon a form supplied for the purpose.

(b) *Revocation.* No person whose airline transport pilot certificate has been revoked shall apply for or be issued a pilot certificate of any grade or rating for a period of 1 year after the revocation, except as the order of revocation may otherwise provide.

§ 21.21-1 *Application (CAA policies which apply to § 21.21).* Application for an Airline Transport Pilot Rating Certificate will be made on Form ACA-342a. This form can be obtained from a representative of the Administrator at any regional, district, or field office. Application must be presented in person to an Aviation Safety Agent or a designated airline transport pilot examiner.

§21.21-2 *Application to amend (CAA policies which apply to § 21.21(a)).* (a) Application for an amendment

[4] See Appendix B for various type ratings. Appendix B not filed with Federal Register Division.

to the Airline Transport Pilot Rating Certificate will be made in accordance with procedures set forth in § 21.21-1.

[Supp. 2, 21 F. R. 7371, Sept. 27, 1956]

§ 21.22 *Issuance.* Upon approval of an application duly made, proofs submitted and examinations and tests satisfactorily completed, an air line transport pilot certificate will be issued in an appropriate form.

(a) *Temporary certificate.* Following application made for an airline transport pilot certificate, but prior to approval thereof and issuance of the certificate, a temporary airline transport pilot certificate may be issued by the examining inspector of the Administrator.

(b) *Special ratings.* A special rating, except an instrument rating, will be issued to and renewed for the holder of a valid airline transport pilot certificate pursuant to the provisions of §§ 20.120 and 20.121, and upon the same terms as such rating is issued to and renewed for the holder of a valid commercial pilot certificate.

(c) *Instruction in air transportation service.* Any person holding a valid airline transport pilot rating shall be considered competent to instruct other pilots in air transportation service in aircraft of a category, class, and type specified in the airline transport pilot rating of the instructing pilot. No pilot shall give more than 8 hours of such instruction in any one day nor more than 36 hours in any 7-day period. Such instruction shall be given only in aircraft equipped with fully functioning dual controls.

§ 21.22-1 *Issuance (CAA policies which apply to § 21.22 (a)).* After the applicant has satisfactorily completed both the written examination and flight test, he will be issued a temporary certificate, Form ACA-1710T. This certificate may be issued by an Aviation Safety Agent only. Hence, if the flight test has been given by a designated examiner, the applicant must obtain a properly endorsed Form ACA-

342A from him for presentation to an Aviation Safety Agent who will issue the Form ACA-1710T. Permanent certificates will be issued from Washington, D. C.

§ 21.23 *Display.* An airline transport pilot certificate shall be kept in the personal possession of the pilot at all times when piloting aircraft, and shall be presented for inspection upon the demand of any passenger, or of any authorized official or employee of the Administrator or Board or any State or municipal official charged with the duty of enforcing local laws or regulations involving Federal compliance, or upon the reasonable request of any other person.

§ 21.24 *Duration.* (a) An airline transport pilot certificate issued to a United States citizen shall remain in effect until surrendered, suspended, revoked, or otherwise terminated by order of the Board. A certificate issued to an applicant other than a United States citizen shall remain in effect for a period no longer than 12 months after the date of issuance, but it may be reissued without further demonstration of technical competence.

(b) A temporary airline transport pilot certificate shall remain in effect for a period no longer than 3 months after the date of issuance.

(c) After revocation, and upon request after suspension, the certificate shall be returned to the Administrator.

(d) Nothing in this section shall be construed to deny or defeat the jurisdiction of the Federal courts, the Administrator, or the Board to impose any authorized sanction, including revocation of the certificate, for a violation of the act or of the regulations in this subchapter occurring during the effective period of the certificate.

(e) Upon application to the Administrator, a person who on April 30, 1953, held a valid airline transport pilot

certificate showing horsepower ratings and who has failed to exchange such certificate may, notwithstanding such failure and without further showing of competence, obtain an airline transport pilot certificate showing the aircraft category and class ratings and any aircraft type ratings for which he was qualified on April 30, 1953: *Provided*, That the holder of such certificate has:

(1) Passed an official rating test, as prescribed by the Administrator, in that type aircraft; or

(2) Successfully accomplished, in that type aircraft, a pilot ground and flight training program acceptable to the Administrator; or

(3) Served as pilot in command and sole manipulator of the controls of that type aircraft for at least 10 hours, since May 1, 1949, and such aircraft was within his category, class, and horsepower ratings.

Such a person may also reinstate any pilot or other special ratings shown on the expired airline transport pilot certificate.

NOTE: All airline transport pilot certificates showing horsepower ratings expired May 1, 1953.

§ 21.25 *Nontransferability.* An airline transport pilot certificate is not transferable.

§ 21.26 *Operation during physical deficiency.* A certificated airline transport pilot shall not operate any aircraft during the period of any known physical deficiency or increase in physical deficiency which would render him during that period unable to meet the physical requirements with which he complied in order to secure his certificate.

§ 21.27 *Termination of certificates.* A certificate issued to an applicant other than a United States citizen shall remain in effect for a period no longer than 12 months

after the date of issuance; however, it may be reissued without further demonstration of technical competence.

§ 21.28 *Re-examination.* (a) An applicant who has failed any prescribed theoretical examination may apply for re-examination at any time after the expiration of 30 days from the date of such failure or after he has received not less than 5 hours instruction in each subject failed from a person employed by an airline to instruct in such subject or from whichever one of the following persons is appropriate:

(1) A certificated airline transport pilot;

(2) A certificated ground instructor rated for the subject;

(3) A person qualified to instruct in the theory of instrument flight.

(b) An applicant who has failed to pass any prescribed practical examination or test may apply for re-examination only after (1) he has logged at least 5 additional hours of flying solely by instruments and at least 5 additional hours of dual flight instruction with a certificated flight instructor or a certificated airline transport pilot, or (2) he has acquired such part of the above practice or instruction as may, in the opinion of the Administrator, warrant re-examination. Upon meeting the requirements of this paragraph an applicant for re-examination shall be deemed to meet the 5 hours flight time requirements set forth in § 21.16(b)(1).

(c) Applicant shall present a statement from the instructor indicating that he has given the required instruction and that he deems the applicant qualified to pass the flight test or that part of the theoretical examination in which such instruction was given, whichever is appropriate.

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§ 21.28-1 *Reexamination (CAA policies which apply to § 21.28(b)).* (a) An applicant who has failed any maneuver (or maneuvers) will be issued a Form ACA-666 which will list specifically the maneuvers which he failed. In a reexamination only the maneuvers failed [5] need be repeated.

(b) Form ACA-666 must be submitted to the agent or examiner prior to reexamination, together with satisfactory evidence that the additional flight time requirements required in § 21.28(b) have been met.

§ 21.28-2 *Instrument flight instruction (CAA policies which apply to § 21.28(a)(3)).* An instructor employed by an air carrier or by a certificated flying school to instruct in courses pertinent to the theory of instrument flight will be considered to qualify under this section.

§ 21.29 *Change of address.* Within 30 days after any change in the permanent mailing address of a holder of a pilot certificate with an airline transport pilot rating, the holder shall notify the Administrator in writing of such change. Such notice shall be mailed to Administrator of Civil Aeronautics, attention Airman Records Branch, Washington 25, D. C.

EXAMINATIONS AND TESTS

§ 21.30 *General.* The examinations and tests prescribed in the regulations of this part (both for an airline transport pilot certificate and for the ratings issued with respect thereto) will be conducted by an authorized officer or employee of the Administrator or by a properly qualified

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[5] The number and relative importance of the maneuvers specified in § 21.17-1 which have been failed will be used as a guide in determining how many hours of flight time are required prior to reexamination.

person designated for the purpose by the Administrator. During the flight tests the air carrier may have a check pilot on board.

§ 21.31 *Physical examination.* In connection with the original issuance of any airline transport pilot certificate the physical examination prescribed shall be accomplished by a medical examiner of the Administrator of Civil Aeronautics, duly authorized to so examine such pilots, before any practical or theoretical test or other examination will be given, and shall be completed within the 6 months preceding the date of filing application for such pilot certificate.

§ 21.32 *Time and place.* All examinations and tests will be held at such times and places as the Administrator may designate.

§ 21.33 *Aircraft used in tests.* The applicant shall furnish a certificated aircraft for any flight test involved. Each such aircraft, used in any test for an airline transport pilot certificate shall be equipped with dual controls and shall accommodate the applicant and the inspector. Aircraft having only one elevator and aileron control for two seats, or any arrangement whereby all flight and engine controls cannot be handled in a normal or conventional manner from either seat, are not considered as having dual controls for the purpose of flight tests for pilot ratings. Each such aircraft shall have adequate vision for the pilot and check pilot.

§ 21.33-1 *Aircraft used in tests (CAA interpretations which apply to § 21.33).* (a) Aircraft used to accomplish flight tests for airline transport pilot ratings may be (1) properly certificated aircraft of U. S. registry; or (2) at the discretion of the agent or examiner, aircraft of foreign registry properly certificated by the authorities of the country in which it is registered; or (3) at the discretion of the agent or examiner, military aircraft on operational

status if permission of the appropriate military authority is obtained.

(b) A suitable hood must be provided by the applicant for the aircraft used. The hood must completely exclude from the applicant all outside forward visual reference and yet not unduly restrict the vision of the agent or examiner.

§21.34 *Aircraft category rating.* For purposes of specifying the category of aircraft which the applicant is deemed competent to pilot and for convenience in examining and rating the applicant with respect thereto, aircraft are categorized as follows:

(a) Airplane;

(b) Autogiro;

(c) Glider;

(d) Lighter-than-air aircraft.

§ 21.35 *Airplane class and type rating*—(a) *Airplane class rating.* For purposes of specifying the class of airplane which the applicant is deemed competent to pilot and for convenience in examining and rating the applicant with respect thereto, airplanes are classed as follows:

(1) Single-engine, land;

(2) Single-engine, sea;

(3) Multiengine, land;

(4) Multiengine, sea;

(5) Unconventional.

(b) *Type rating.* An aircraft type rating shall be issued for each type of aircraft having a maximum certificated take-off weight of more than 12,500 lbs.

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§ 21.36 *Inspection.* The applicant for an airline transport pilot certificate shall offer full cooperation in respect of any inspection or examination which may be made of said applicant upon proper demand by any authorized representative of the Administrator prior or subsequent to the issuance of such certificate.

§ 21.37 *Standard of performance.* Every practical and theoretical examination and test shall be accomplished to the satisfaction of the Administrator and the minimum passing grade in the subject of examination or test shall be 70 percent. Each flight maneuver will be graded separately. Other examinations will be graded as a whole.

§ 21.38 *Reports.* The person giving any examination or test in behalf of the Administrator will report the result thereof upon an appropriate form to the Administrator and all data collected incident to such examination or test will be considered as of a confidential nature by such person and by all employees of the Civil Aeronautics Administrator.

Pilot Regulations

§ 21.40 *Certificated airline transport pilots*—(a) *Rating limitations.* No certificated airline transport pilot shall operate any aircraft other than in accordance with the rating limitations set forth in his pilot certificate: *Provided*, That the holder of a valid airline transport pilot certificate may pilot airplanes:

(1) As a second pilot without an airplane class and horsepower rating for the particular airplane operated;

(2) As a first pilot of a class or within a horsepower range other than that specified in his airline transport pilot

certificate, but he shall not carry any person in such airplanes other than members of the crew thereof, certificated airmen carried in air carrier airplanes in furtherance of their official duties, or a certificated instructor rated for the airplane operated.

(b) *Periodic physical examinations.* A certificated airline transport pilot shall not pilot an aircraft in operations for which he is required to possess an airline transport pilot rating unless, within the preceding 6 calendar months, he has met the physical requirements of this part by passing an examination given by an authorized airline medical examiner of the Administrator.

(c) *Medical certificate.* A medical certificate issued by an authorized airline medical examiner of the Administrator or other evidence satisfactory to the Administrator that the pilot has met the physical requirements of this part shall be carried by such pilot while piloting aircraft.

§ 21.40-1 *Retention of existing ratings upon issuance of a pilot certificate of a higher rating (CAA policies which apply to § 21.40).* (a) The holder of a commercial pilot certificate who qualifies for an airline transport pilot certificate may retain all of his commercial pilot certificate ratings. However, when such ratings are endorsed on his airline transport pilot certificate, he may exercise only the privileges of a commercial pilot in respect to such ratings. In order to exercise such privileges, he must hold a first class medical certificate issued within the past 12 calendar months.

§ 21.41 *Passenger carrying.* A certificated airline transport pilot shall not pilot any aircraft carrying any person other than members of the crew thereof, certificated

airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless, within the 90 days immediately preceding, he shall have made at least 3 take-offs, and 3 landings to a full stop, in an aircraft of the same category (§ 21.34) and if an airplane, within the same class (§ 21.35 (a)) as that of the aircraft in which any such person is carried.

§ 21.42 *Recent experience requirements*—(a) *Passenger flight (day and night).* A certificated airline transport pilot shall not pilot an aircraft carrying any person other than the members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless within the preceding 3 calendar months he shall have made and logged at least 3 take-offs and landings to a full stop in an aircraft of the same category, class, and type as that of the aircraft in which such person is carried.

(b) *Instrument flight.* A certificated airline transport pilot, who within the preceding 6 calendar months has not flown and logged at least 2 ~~hours of flight time~~ solely by reference to instruments under either actual or properly simulated instrument flight conditions, shall not pilot an aircraft under such conditions until he has flown and logged at least 2 hours of such flight time accompanied by a certificated pilot of at least private grade holding an appropriate category, class, and type rating for the aircraft and authorized to operate aircraft under instrument conditions.

§ 21.43 *Instruction.* No person holding a valid airline transport pilot certificate shall give flying instruction, except as provided for in § 21.22 (c), unless possessed of a valid instructor rating.

Appendix A

§ 21.44 *Logbooks.* The following rules will govern pilot logbooks:

(a) *General.* Every certificated airline transport pilot shall keep an accurate record of his flying time in a logbook in which the entries as to solo flying time have been certified to by him and the entries as to instruction have been certified to by his instructor. Logbooks shall be bound records and the entries shall be accurate, legible, in ink or indelible pencil, and so arranged as to facilitate easy reference thereto.

(b) *Contents.* The logbook shall contain the date of flight, the category, class, and type of aircraft flown, the aircraft certificate number, a statement of pilot in command, dual instruction, instrument and night flight time, the duration of the flight, the points between which such flight was made, and, in addition, when any flight results in serious damage to the aircraft, a notation to this effect. Dual instruction time shall be logged in the same manner and, in addition, the instructor shall make complete entries in the logbook of his student showing the nature of each maneuver in which instruction was given and the time spent thereon. The instructor shall attest each such entry with his initials, pilot certificate number, and pertinent rating. This logbook shall be presented for inspection, upon demand and reasonable notice, to any authorized representative of the Administrator or Board or State or municipal officer enforcing local regulations or laws involving Federal compliance.

(c) *Logging of pilot flight time.* The holder of an airline transport pilot certificate may log the total flight time while acting as pilot in command or co-pilot.

(d) *Logging instrument flight time.* Instrument flight time may be logged as such only when the aircraft is flown

solely by reference to instruments either under actual or properly simulated flight conditions. (Over-the-top flying shall not be logged as instrument flight time.)

(e) *Reports.* The holder of an airline transport pilot certificate shall furnish the authorized airline medical examiner of the Administrator, at the time of each physical examination to be forwarded by him to the Administrator, a report setting forth the amount and type of his aeronautical experience and such other pertinent data as the Administrator may require since his last preceding report.

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14 C. F. R. PART 29 *

PHYSICAL STANDARDS FOR AIRMEN, MEDICAL CERTIFICATES

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§ 29.1 *Issuance of medical certificates.* A medical certificate of the appropriate class shall be issued to an applicant if the Administrator or his authorized representative finds that the applicant meets the physical standards prescribed in this part.

§ 29.2 *First class*—(a) *Eye.* Applicant shall have:

(1) A visual acuity of at least 20/20 in each eye separately without correction: *Provided*, That if the vision in either or both eyes is not poorer than 20/50 and is brought up to 20/20 or better in each such eye by glasses, the applicant may be qualified upon condition that correcting glasses be worn while exercising the privileges of his airman certificate.

(2) An average depth perception of 30 millimeters or less on a prescribed depth perception apparatus, with or

* As of March 15, 1958.

without correction: *Provided*, That if the depth perception is greater than 30 millimeters without correction, and is corrected to at least 30 millimeters average by glasses, the applicant may be qualified upon condition that such glasses be worn while exercising the privileges of his airman certificate.

(3) No diplopia in any meridian within 35 degrees from the point of visual fixation.

(4) Not more than one diopter of hyperphoria in either eye.

(5) Not more than 10 diopters of esophoria.

(6) Not more than 5 diopters of exophoria.

(7) An abduction of not less than 3 diopters nor more 15 diopters.

(8) An adduction of 6 or more diopters.

(9) A near vision of at least $v=1.00$ at 18 inches with each eye separately without the use of correcting lenses: *Provided*, That if near vision in either or both eyes is poorer than $v=1.00$ at 18 inches the applicant shall possess the necessary correcting lenses.

(10) Normal color vision.

(11) Normal visual fields.

(12) No acute or chronic pathological condition of either eye or adenexae which may interfere with its proper function, may progress to that degree, or may be aggravated by flying.

(b) *Ear, nose, throat, and equilibrium.* (1) Applicant shall be able to hear the whispered voice at 8 feet with each ear separately; shall have no acute or chronic disease of the middle or internal ear; no disease of the mastoid; no unhealed (unclosed) perforations of the ear drum; no disease or malformation of the nose or throat which may interfere with or be aggravated by flying; and no disturbance in equilibrium.

(2) If the hearing acuity for the whispered voice is less than 20 feet in either ear the applicant shall possess a hearing acuity of at least 50 percent of normal in each ear throughout the effective speech and radio range as demonstrated by a standard audiometer.

(c) *General physical condition.* (1) Applicant shall have no organic or functional disease or structural defect or limitation which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade of airman certificate held or sought.

(2) Unless the adjusted maximum readings apply, applicant's reclining blood pressure shall not exceed the maximum readings for his age group, as indicated in the table in this subparagraph. The adjusted maximum readings shall apply to any applicant, age 30 years or more, whose reclining bood pressure exceeds the maximum readings for his age group and whose cardiac and kidney conditions, after complete cardiovascular examination, are shown to be normal.

Age group	Maximum readings (reclining blood pressure in mm.)		Adjusted maximum (reclining blood pressure in mm.)	
	Systolic	Diastolic	Systolic	Diastolic
20-29	140	88	—	—
30-39	145	92	155	98
40-49	155	96	165	100
50 and over	160	98	170	100

(3) Applicant 40 years of age or over shall demonstrate a degree or circulatory efficiency compatible with the safe operation of aircraft at high altitudes.

(d) *Nervous system.* Applicant shall have no disease of the mental or nervous system or abnormality of the personality which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade and airman certificate held or sought.

§ 29.3 *Second class*—(a) *Eye.* Applicant shall have:

(1) A visual acuity of at least 20/20 in each eye separately without correction: *Provided,* That if the vision in either or both eyes is not poorer than 20/50 and is brought up to 20/20 or better in each such eye by glasses, the applicant may be qualified upon condition that correcting glasses be worn while exercising the privileges of his airman certificate.

(2) An average depth perception of 30 millimeters or less on a prescribed depth perception apparatus, with or without correction: *Provided,* That if the depth perception is grated than 30 millimeters without correction, and is corrected to at least 30 millimeters average by glasses, the applicant may be qualified upon condition that such glasses be worn while exercising the privileges of his airman certificate.

(3) No diplopia in any meridian within 35 degrees from the point of visual fixation.

(4) Not more than one diopter of hyperphoria.

(5) Properly balanced eye muscles with an abduction of 3 diopters or more, and adduction of 6 diopters or more.

(6) Sufficient accommodation to pass a test prescribed by the Administrator based primarily upon ability to read official aeronautical maps.

(7) Normal fields of vision.

(8) No pathology of the eye.

(9) The ability to distinguish aviation signal red, aviation signal green, and white.

(b) *Ear, nose, throat, and equilibrium.* Applicant shall be able to hear the whispered voice at 8 feet with each ear separately; shall have no acute or chronic disease of the middle or internal ear; no disease of the mastoid; no unhealed (unclosed) perforations of the ear drum; no disease or malformation of the nose or throat which may interfere with or be aggravated by flying; and no disturbance in equilibrium.

(c) *General physical condition.* Applicant shall have no organic or functional disease or structural defect or limitation which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade of airman certificate held or sought.

(d) *Nervous system.* Applicant shall have no disease of the mental or nervous system or abnormality of the personality which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade of airman certificate held or sought.

§ 29.4 *Third class.*—(a) *Eye.* Applicant shall have:

(1) A visual acuity of at least 20/50 in each eye separately without correction: *Provided,* That if the vision in either or both eyes is poorer than 20/50 and is brought up to 20/30 or better in each such eye by glasses, the applicant may be qualified upon condition that such glasses be worn while exercising the privileges of his airman certificate.

(2) No serious pathology of the eye.

(3) The ability to distinguish aviation signal red, aviation signal green, and white.

(b) *Ear, nose, throat, and equilibrium.* Applicant shall be able to hear the whispered voice at 3 feet; shall have no acute or chronic disease of the internal ear, no disease or malformation of the nose or throat which may interfere with or be aggravated by flying, and no disturbance in equilibrium.

(c) *General physical condition.* Applicant shall have no organic or functional disease or structural defect or limitation which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade of airman certificate held or sought.

(d) *Nervous system.* Applicant shall have no disease of the mental or nervous system or abnormality of the personality which would be likely to render him unable to safely perform the duties and exercise the privileges of the grade of airman certificate held or sought.

§ 29.5 *Physical deficiencies.* (a) A limited medical certificate shall be issued to an applicant who fails to meet the physical standards prescribed for the medical certificate sought if the Administrator finds, through more extensive medical examinations, practical tests or otherwise that, by the imposition of terms, conditions, or limitations, the applicant, notwithstanding his physical deficiency, can perform the duties and exercise those privileges authorized by the Administrator without endangering safety in air commerce. The operational limitations imposed by the Administrator shall be set forth on the applicant's airman certificate.

(b) Where the Administrator's finding regarding an individual's physical fitness is based upon a practical test, that individual shall not be required to retake such practical test during subsequent physical examinations unless, in the opinion of the Administrator, the individual's physical deficiency has become more pronounced.

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Appendix A

14 C. F. R. PART 40

SCHEDULED INTERSTATE AIR CARRIER

CERTIFICATION AND OPERATION RULES

* * *

APPLICABILITY AND DEFINITIONS

§ 40.1 *Applicability of this part.* The provisions of this part are applicable to air carriers holding certificates of public convenience and necessity issued in accordance with Title IV of the Civil Aeronautics Act of 1938, as amended, when they engage in scheduled interstate air transportation within the continental limits of the United States: *Provided,* That the provisions of this part shall not apply to operations conducted pursuant to economic exemption authority issued by the Board for a period of 90 days or less: *And provided further,* That the Administrator may authorize any air carrier holding authority to engage in scheduled cargo operations pursuant to Title IV of the Civil Aeronautics Act of 1938, as amended, to conduct such operations in accordance with the air carrier certification and operations rules prescribed in Part 42 of this subchapter: *And provided further,* That in the case of segments of routes extending beyond the continental limits of the United States the Administrator may authorize an air carrier to conduct operations over such route segments pursuant to provisions of this part.

* * *

CERTIFICATION, RULES, AND OPERATIONS SPECIFICATIONS REQUIREMENTS

§ 40.10 *Certificate required.* No person subject to the provisions of this part shall operate an airplane in scheduled interstate air transportation without, or in violation of the terms of, an air carrier operating certificate issued by the Administrator.

* * *

Appendix A

REQUIREMENTS FOR SERVICES AND FACILITIES

§ 40.30 *Route requirements; demonstration of competence.* The air carrier shall show that it is competent t conduct scheduled operations over any route or route segment between any regular, provisional, or refueling airport and that the facilities and services available are adequate for the type of operation proposed. The Administrator shall not require actual flight over a route or route segment, if the air carrier shows that such flight is not essential to safety. The air carrier may thereafter conduct operations between regular, provisional, or refueling airports on any approved route or routes on which the operational facilities and procedures are substantially similar: *Provided*, That high-altitude operations may be conducted over any route.

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MANUAL REQUIREMENTS

§ 40.50 *Preparation of manual.* The air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in the conduct of its operations.

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AIRPLANE REQUIREMENTS

§ 40.60 *General.* Airplanes shall be identified, certificated, and equipped in accordance with the applicable airworthiness requirements of the regulations in this subchapter. No air carrier shall operate any airplane in scheduled operation unless such airplane meets the requirements of this part and is in an airworthy condition.

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SPECIAL AIRWORTHINESS REQUIREMENTS

§ 40.110 *Fire prevention.* All airplanes used in passenger service, powered by engines rated at more than 600

horespower each for maximum continuous operation and which have not been certificated in accordance with the provisions of Part 4b of this subchapter in effect on or after November 1, 1946, shall comply with the requirements contained in §§ 40.111 through 40.143: *Provided,* That if the Administrator finds that in particular models of existing airplanes literal compliance with specific items of these requirements might be extremely difficult of accomplishment and that such compliance would not contribute materially to the objective sought, he may accept such measures of compliance as he finds will effectively accomplish the basic objectives of these regulations.

* * *

INSTRUMENTS AND EQUIPMENT FOR SPECIAL OPERATIONS

§ 40.170 *Aircraft instruments and equipment for all operation.* (a) Instruments and equipment required by §§ 40.171 through 40.232 shall be approved and shall be installed in accordance with the provisions of the airworthiness requirements applicable to the instruments or equipment concerned.

* * *

§ 40.200 *Instruments and equipment for operations at night.* Each airplane operated at night shall be equipped with the following instruments and equipment in addition to those required by §§ 40.171 through 40.178:

(a) Flashing position lights;

(b) After May 31, 1956, an anti-collision light for airplanes having a maximum certificated weight of more than 12,500 pounds;

(c) Two landing lights;

(d) Two class 1 or class 1A landing flares;

(e) Instrument lights providing sufficient illumination to make all instruments, switches, etc., easily readable, so installed that their direct rays are shielded from the flight crew members' eyes and that no objectionable reflections are visible to them. A means of controlling the intensity of illumination shall be provided unless it is shown that nondimming instrument lights are satisfactory;

(f) An air-speed indicating system with heated pilot tube or equivalent means for preventing malfunctioning due to icing; and

(g) A sensitive altimeter.

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§ 40.241 *Maintenance and inspection requirements.* (a) The air carrier, or the person with whom arrangements have been made for the performance of maintenance and inspection functions, shall establish an adequate inspection organization responsible for determining that workmanship, methods employed, and material used are in conformity with the requirements of the regulations of this subchapter, with accepted standards and good practices, and that any airframe, engine, propeller, or appliance released for flight is airworthy.

(b) Any individual who is directly in charge of inspection, maintenance, overhaul, or repair of any airframe, engine, propeller, or appliance shall hold an appropriate license or airman certificate.

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AIRMAN AND CREW MEMBER REQUIREMENTS

§ 40.260 *Utilization of airman.* No air carrier shall utilize an individual as an airman unless he holds a valid appropriate airman certificate issued by the Administrator and is otherwise qualified for the particular operation in which he is to be utilized.

Appendix A

§ 40.261 *Composition of flight crew.* (a) No air carrier shall operate an airplane with less than the minimum flight crew specified in the airworthiness certificate for the type of airplane and required in this part for the type of operation.

(b) Where the provisions of this part require the performance of two or more functions for which an airman certificate is necessary, such requirement shall not be satisfied by the performance of multiple functions at the same time by any airman.

(c) Where the air carrier is authorized to operate under instrument conditions or operates airplanes of more than 12,500 pounds maximum certificated weight, the minimum pilot crew shall be 2 pilots.

(d) On flights requiring a flight engineer, at least one other flight crew member shall be sufficiently qualified, so that in the event of illness or other incapacity, emergency coverage can be provided for that function for the safe completion of the flight. A pilot need not hold a flight engineer certificate to function in the capacity of a flight engineer for such emergency coverage.

§ 40.263 *Flight engineer.* An airman holding a valid flight engineer certificate shall be required on all airplanes certificated for more than 80,000 pounds maximum certificated take-off weight. Such airman shall also be required on all four-engine airplanes certificated for more than 30,000 pounds maximum certificated take-off weight where the Administrator finds that the design of the airplane used or the type of operation is such as to require engineer personnel for the safe operation of the airplane.

§ 40.265 *Flight attendant.* At least one flight attendant shall be provided by the air carrier on all flights car-

rying passengers in airplanes of 10-passenger capacity or more.

§ 40.266 *Aircraft dispatcher.* Each air carrier shall provide an adequate number of qualified dispatchers at each dispatch center to insure the proper operational control of each flight.

§ 40.267 *Assignment of emergency evacuation functions for each crew member.* After May 31, 1956, each air carrier shall assign all necessary emergency functions for each crew member to perform in the event of circumstances requiring emergency evacuation. The air carrier shall show that functions so assigned are practicable of accomplishment. These functions shall be described in the air carrier manual.

TRAINING PROGRAM

§ 40.280 *Training requirements.* (a) Each air carrier shall establish a training program sufficient to insure that each crew member and dispatcher used by the air carrier is adequately trained to perform the duties to which he is to be assigned. The initial training phases shall be satisfactorily completed prior to serving in scheduled operations.

(b) Each air carrier shall be responsible for providing adequate ground and flight training facilities and properly qualified instructors. There also shall be provided a sufficient number of check airmen to conduct the flight checks required by this part. Such check airmen shall hold the same airman certificates and ratings as are required for the airman being checked.

(c) The training program for each flight crew member shall consist of appropriate ground and flight training including proper flight crew coordination. Procedures for

each flight crew function shall be standardized to the extent that each flight crew member will know the functions for which he is responsible and the relation of those functions to those of other flight crew members. The initial program shall include at least the appropriate requirements specified in §§ 40.281 through 40.286.

(d) The crew member emergency procedures training program shall include at least the requirements specified in § 40.286.

(e) The appropriate instructor, supervisor, or check airman responsible for the particular training or flight check shall certify to the proficiency of each crew member and dispatcher upon completion of his training, and such certification shall become a part of the individual's record.

* * *

FLIGHT CREW MEMBER AND DISPATCHER QUALIFICATION

§ 40.300 *Qualification requirements.* (a) No air carrier shall utilize any flight crew member or dispatcher, nor shall any such airman perform the duties authorized by his airman certificate, unless he satisfactorily meets the appropriate requirements of § 40.280 or § 40.289, and §§ 40.301 through 40.310. All pilots serving as pilot in command shall hold appropriate airline transport pilot certificates and ratings. All other pilots shall hold at least commercial pilot certificates and instrument ratings.

(b) Check airmen shall certify as to the proficiency of the pilot in command being examined, as required by §§ 40.302 and 40.303, and such certification shall become a part of the airman's records.

§ 40.301 *Pilot recent experience.* No air carrier shall schedule a pilot to serve as such in scheduled air transportation unless within the preceding 90 days he has made at

least 3 take-offs and 3 landings in the airplane of the particular type on which he is to serve.

* * *

FLIGHT TIME LIMITATIONS

§ 40.320 *Flight time limitations.* (a) An air carrier shall not schedule any flight crew member for duty aloft in scheduled air transportation or in other commercial flying if his total flight time in all commercial flying will exceed the following flight time limitations:

(1) 1,000 hours in any year.

(2) 100 hours in any month.

(3) 30 hours in any seven consecutive days.

* * *

REQUIRED RECORDS AND REPORTS

§ 40.500 *Records.* Each scheduled air carrier shall maintain records and submit reports in accordance with the requirements of §§ 40.501 through 40.511. All records shall be retained for the period specified in Part 249 of Subchapter B of this chapter (Economic Regulations), unless otherwise specified in §§40.501 through 40.511.

* * *

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 337 October Term, 1959.

(Argued April 8, 1960 Decided April 21, 1960.)

Docket No. 26174

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an Unincorporated Association, Clarence N. Sayen, *et al.*,

Plaintiffs-Appellants,

—v.—

ELWOOD R. QUESADA, Individually and as Administrator of the Federal Aviation Agency,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
HAND and HINCKS, *Circuit Judges*.

Plaintiffs appeal from an order of the United States District Court for the Southern District of New York, Alexander Bicks, *J.*, denying a preliminary injunction in a suit to restrain enforcement by defendant Administrator of the Federal Aviation Agency, of a regulation forbidding commercial air carriers from utilizing pilots beyond the age of sixty.

Affirmed.

Appendix B

SAMUEL J. COHEN, New York, N. Y. (HENRY WEISS, HERBERT A. LEVY and COHEN AND WEISS, New York, N. Y., on the brief), for plaintiffs-appellants.

S. HAZARD GILLESPIE, JR., United States Attorney, Southern District of New York, New York, N. Y. (ROBERT J. WARD, Assistant United States Attorney, SHERMAN J. SAXL, Assistant United States Attorney, DAGGETT W. HOWARD, General Counsel, Federal Aviation Agency, WILLIAM A. CRAWFORD, JR., Chief Attorney, Federal Aviation Agency, on the brief), for defendant-appellee.

LUMBARD, *Chief Judge*:

On December 1, 1959 the defendant, Elwood R. Quesada, Administrator of the Federal Aviation Agency, promulgated a regulation which provides:

> "No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft while engaged in air carrier operations."[1]

This regulation took effect on March 15, 1960.

The plaintiffs, thirty-five individual pilots, their collective bargaining representative, Air Line Pilots Association,

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[1] 14 C. F. R. § 40.260(b). Part 40 of the regulations concerns scheduled interstate air carrier operations. An identical provision appears at 14 C. F. R. § 41.48(e); Part 41 pertains to air carrier operations outside the continental limits of the United States. Part 42, which governs irregular air carrier operations, contains the same provision at 14 C. F. R. § 42.40(c), except that in this provision the word "large" appears in front of "aircraft."

The regulation does not apply to private or other pilots not engaged in carrying passengers, mail, or freight for hire. See Federal Aviation Act of 1958, § 101, 49 U. S. C. § 1301.

and its president, brought the suit in January 1960 for a declaratory judgment that the regulation was null and void and for an injunction against its threatened application. The complaint alleged—and the plaintiffs contend on this appeal—that the regulation is invalid because it was issued without the holding of adjudicatory hearings required by the Administrative Procedure Act, 5 U. S. C. §§ 1001-11, and by § 609 of the Federal Aviation Act of 1958, 49 U. S. C. § 1429, before an airman's license may be amended, modified, suspended or revoked, and because it was arbitrary, discriminatory and without reasonable relation to the standards set forth in § 601 of the Act, 49 U. S. C. § 1421, under which it was issued. The plaintiffs also claim that the regulation, by terminating their right to pilot planes in commercial service after age sixty, deprives them of property in their pilots' licenses without due process of law. The district court, after submission of lengthy affidavits, denied the plaintiffs' motion for a preliminary injunction but reserved judgment on the Administrator's cross motion for summary judgment. Plaintiffs brought this appeal under § 1292(a)(1) of the Judicial Code. We affirm the order.[2]

The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nation's airspace. The Administrator was given the authority, theretofore divided between the Civil Aeronautics Board and the Civil Aeronautics Authority:

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[2] Since it is clear that the individual pilot plaintiffs have standing to challenge the regulation, we need not decide whether the other plaintiffs, Air Line Pilots Association, International, and Clarence Sayen, its president, have standing to raise the issues before us.

Nor do we decide whether the plaintiffs have made a showing of irreparable injury adequate to warrant the granting of a preliminary injunction.

Appendix B

"* * * [T]o promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

* * *

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure as the Administrator may find necessary to provide adequately for national security and safety in air commerce." [3]

Pursuant to this statutory authority the Administrator and his medical staff in the fall of 1958 began a study concerning the aging process and the diseases and physiological deterioration that accompany it in an effort to determine whether a maximum age should be set for service by commercial pilots. The Administrator took counsel with various experts in aviation medicine and safety and, among other things, determined the practices followed by five foreign air lines with respect to a mandatory retirement age. Finally, in June 1959 the Administrator published a proposed regulation in substance the same as that ultimately

[3] Federal Aviation Act of 1958, § 601(a), 49 U. S. C. § 1421(a). Section 601(b) goes on to state in part:

"In prescribing standards, rules, and regulations * * * the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest. * * * The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation. * * *"

prescribed.[4] In accordance with the rule-making requirements of § 4 of the Administrative Procedure Act, 5 U. S. C. § 1003, opportunity was afforded for the submission of written data and briefs. About one hundred comments, including those of the plaintiff association, were received. A large majority favored the regulation. No hearing was held since the Administrator determined, as he was entitled to under the rule-making provisions of the Administrative Procedure Act, that a hearing would not "serve a useful purpose" and that it was not "necessary in the public interest."

Plaintiffs assert that since the certificates of all commercial pilots are in effect modified by the regulation, and in the case of pilots already sixty, terminated, promulgation of the regulations was not rule-making within the meaning of the Administrative Procedure Act, but that the Administrator was obliged to proceed by holding an adjudicative hearing for each airman affected and by the entry of an "order."[5] Alternatively, they say that whether one labels the issuance of the regulation rule-making or not, § 609 of the Federal Aviation Act, 49 U. S. C. § 1429, requires the

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[4] 24 Fed. Reg. 5249 (1959). The proposed regulation also stated:

"No individual who has reached his 55th birthday shall be utilized or serve as a pilot in command, or as second in command of a flight crew of 3 or more pilots, on a turbojet-powered aircraft engaged in air carrier operations unless he held an aircraft type rating for the particular aircraft either prior to such birthday or the effective date of this regulation."

This provision was subject to considerable criticism and is still under consideration by the Administrator.

[5] Section 2(d) of the Administrative Procedure Act, 5 U. S. C. § 1001(d) states:

"'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form), of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

Administrator to hold a hearing and permit each pilot affected to submit evidence as to the fairness of the regulation before his certificate can be amended.

Section 2 of the Administrative Procedure Act, 5 U. S. C. § 1001, defines a "rule" as "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. * * *" The regulation before us is just such a statement. It is directed to all the commercial airlines and to the more than 18,000 licensed commercial pilots. It looks to the future. It has the character of legislative enactment carried out on an administrative level. See *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 693 (9 Cir.), cert. denied, 338 U. S. 860 (1949). Adjudication, on the other hand, whether administrative or judicial, is the application of a statute or other legal standard to a given fact situation involving particular individuals. Promulgation of the age sixty limitation by the Administrator was the very antithesis of adjudication: it was the formulation of a general rule to be applied to individual pilots at a subsequent time. We think the directive was properly issued in accordance with the rule-making requirements of § 4 of the Administrative Procedure Act. See *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956); *Air Line Pilots Ass'n* v. *CAB*, 215 F. 2d 122 (2 Cir. 1954); 1 Davis, Administrative Law § 5.01 (1958); Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259 (1938).

The Administrator's action does not lose the character of rule-making because it modifies the plaintiff pilots' claimed property rights in their licenses and their contrac-

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[6] Sections 7 and 8 of the Administrative Procedure Act are not applicable in this case, since these sections are made applicable by § 4(b) to rule-making proceedings only when "rules are required by statute to be made on the record after opportunity for an agency hearing. * * *" The Federal Aviation Act contains no such requirement.

tual rights under collective bargaining agreements to pilot planes beyond age sixty. Nor does the regulation violate due process because it modifies pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See *United States* v. *Storer Broadcasting Co., supra; Bowles* v. *Willingham*, 321 U. S. 503, 519-520 (1944). Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules,[7] the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected—here some 18,000—might demand to be heard individually. When met with a similar challenge, Justice Holmes stated:

> "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving him a chance to be heard." *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915).

All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest. Only when the limitations are too strin-

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[7] Each license issued to a pilot itself states: "This license is of such duration as is provided in the currently effective Civil Air Regulations, unless sooner suspended or revoked."

gent in relation to the public interest to be served are they invalid. The limitations here are entirely reasonable. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934).

The plaintiffs strenuously urge that, however things may be under the Administrative Procedure Act, the statutory scheme of the Federal Aviation Act shows that Congress intended to afford airmen the greater protection of an individual hearing before their certificates may be modified. We disagree. Section 609 of the Act, 49 U. S. C. § 1429, states that "the Administrator may * * * reexamine any civil airman," and if, as a result of such reexamination, the Administrator "determines that safety in air commerce * * * and the public interest requires, [he] may issue an order amending, modifying, suspending, or revoking * * * [any] airman certificate." The certificate holder must be advised of the "charges or other reasons relied upon by the Administrator" for his action, and a hearing must be afforded with a right of appeal and trial *de novo* before the Civil Aeronautics Board and ultimate right of review in the courts of appeals. It is clear that Congress intended that the section should apply only when an order of the Administrator is directed to an individual airman and is concerned with conduct or other facts peculiar to that airman. Use of "airman" in the singular, the reference to "charges," the word "order" in contrast with "regulation" in § 601, and the statement that upon review the Board shall not "be bound by findings of fact of the Administrator" all strongly suggest that § 609 is not intended to apply when a general directive of the Administrator is promulgated, though the regulation may in fact modify airmen's certificates. Cf. §§ 602, 604 of the Act, 49 U. S. C. §§ 1422, 1424. Moreover, were we to interpret § 609 to apply to a case like that before us, the area in which § 601 might operate would be severely restricted.

There is no indication anywhere that Congress intended such limitation on § 601. Indeed, the legislative history of

the Federal Aviation Act and the practice under the prior law show that Congress intended the Administrator to have broad power to establish safety rules for the nation's airways without the delay attendant upon numerous individual hearings and protracted appeals. The immediate impetus to the legislation was a series of major air crashes culminating in the midair collision of two large airlines [sic] over the Grand Canyon in 1956 with the loss of 128 lives. Congress believed there was a need for a more streamlined and efficient means for safety rule-making in place of the system of divided duties and responsibilities existing under the Civil Aeronautics Act. The committee reports make plain that the Administrator was to have sole responsibility for safety rule-making under the new law, and that the procedures of § 609 were only to come into operation when the administrator modified or revoked "a certificate." H. R. Rep. No. 2360, 85th Cong., 2d Sess. (1958); see S. Rep. No. 1811, 85th Cong., 2d Sess. (1958). The elaborate procedural requirements of § 609 are patently incompatible with the expedition with which Congress intended that the Administrator should act in the promulgation of safety rules. The clear public interest in the speedy adoption of rules relating to air safety far outweighs any possible advantage in a multitude of piecemeal and time-consuming hearings brought by each contesting airman.

The practice under the prior law also lends support to our interpretation of the present statute. Under a rule-making provision[5] similar to § 601 of the 1958 statute, the CAB for many years promulgated rules setting forth physical standards to be met by pilots, see 14 C. F. R. § 29.1-4, and also directives to airlines concerning pilot training, maximum hours of flight and other similar matters. See, e.g., 14 C. F. R. §§ 14.300-303, 320. Though these regulations had the effect of modifying the certificates of airmen,

[5] 52 Stat. 1007 (1938).

the procedures of the statutory provisions[9] paralleling the present § 609 were not followed and no hearing was afforded each pilot. See *Air Line Pilots Ass'n* v. *CAB*, *supra*. Nor have any of the proceedings brought against airmen pursuant to the provisions of law which were the predecessor of § 609 involved the challenge of a regulation issued by the CAB, so far as we have been able to find. See, e.g., *Specht* v. *CAB*, 254 F. 2d 905 (8 Cir. 1958); *Wilson* v. *CAB*, 244 F. 2d 773 (D. C. Cir.), cert. denied, 355 U. S. 870 (1957).[10]

Plaintiffs assert that the age sixty limitation is arbitrary and discriminatory and without relation to any requirements of safety. For purposes of judicial review, such an argument must mean that the Administrator had no reasonable basis for his exercise of judgment. *American Trucking Ass'ns* v. *United States*, 344 U. S. 298, 314 (1953); *Norman* v. *Baltimore & Ohio R.R.*, 294 U. S. 240 (1935). Surely this is not the fact in the case before us as there is considerable support for the Administrator's action. The Administrator found that the number of commercial pilots over sixty years of age has until recent years been very few but is increasing rapidly; that older pilots because of their seniority under collective bargaining agreements often fly the newest, largest, and fastest planes;

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[9] 52 Stat. 1011 (1938).

[10] Plaintiffs also contend that under prior practice the regulations afforded a license applicant or license holder an opportunity to apply for an exemption from the physical requirements of the regulations, see 14 C. F. R. § 29.5, but that by placing the present rule in Part 40 of the regulations, 14 C. F. R. § 40.260(b), as a directive to the airlines, this opportunity has been taken away. Apart from the fact that we doubt that the Administrator is required by the statute to afford anyone an opportunity to apply for an exemption from any requirement of the regulations, we think it is probable that the present statute and regulations do afford just such an opportunity. See § 601(c) of the Act, 49 U. S. C. § 1421(c), and 14 C. F. R. §§ 405.10, .20, .31. Cf. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956).

that available medical studies show that sudden incapacitation due to heart attacks or strokes become more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks; that a number of foreign air carriers contacted had mandatory retirement ages of sixty or less; and that numerous aviation safety experts advocated establishing a maximum age of sixty or younger. In spite of these considerations, plaintiffs ask us to weigh other arguments against the establishment of a maximum age and to hold that the Administrator's action was unreasonable. It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress. The Administrator is an expert in his field; this is the very reason he was given the responsibility for the issuance of air safety regulations. We can only ask whether the regulation is reasonable in relation to the standards prescribed in the statute and the facts before the Administrator. Of that there can be no doubt in this case.

Nor is the regulation discriminatory because it applies only to the piloting of commercial aircraft, and does not restrict pilots with respect to other planes. The Administrator did not act unreasonably in placing greater limitations on the certificates of pilots flying planes carrying large numbers of passengers who have no opportunity to select a pilot of their own choice. The Federal Aviation Act contemplates just such distinctions between the regulations governing "air commerce" and those governing other air transportation. See § 601(b), 49 U. S. C. § 1421(b).

The preliminary injunction was properly denied. The order is affirmed.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 218—October Term, 1960.

(Argued January 20, 1961 Decided February 9, 1961.)

Docket No. 26432

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association, CLARENCE N. SAYEN, etc., *et al.*,

Plaintiffs-Appellants,

v.

ELWOOD R. QUESADA, individually and as Administrator of the Federal Aviation Agency,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
MEDINA and SMITH, *Circuit Judges*.

Plaintiffs appeal from summary judgment in the United States District Court for the Southern District of New York, Alexander Bicks, *J.*, dismissing their complaint in a suit to restrain enforcement by defendant, Administrator of the Federal Aviation Agency, of a regulation forbidding commercial air carriers from utilizing pilots aged sixty or more.

Affirmed.

Appendix C

SAMUEL J. COHEN, New York, N. Y. (HENRY WEISS and HERBERT A. LEVY, COHEN AND WEISS, New York, N. Y., on the brief), for plaintiffs-appellants.

S. HAZARD GILLESPIE, JR., United States Attorney for the Southern District of New York, New York City (ROBERT J. WARD, SHERMAN J. SAXL, Assistant United States Attorneys, DAGGETT H. HOWARD, General Counsel, WILLIAM A. CRAWFORD, JR., Chief Attorney, Federal Aviation Agency, Washington, D. C., on the brief), for defendant-appellee.

PER CURIAM:

This controversy reaches us again upon an appeal from the district court's entry of summary judgment in favor of the defendant. Suit had been brought against the defendant, Administrator of the Federal Aviation Agency, for a judgment declaring null and void the regulation promulgated by him prohibiting the use of pilots sixty years of age or more in air carrier operations and for an injunction restraining enforcement of the regulation. Plaintiffs' motion for a temporary injunction was denied by the district court. 182 F. Supp. 595. We affirmed with an opinion in which we held that the promulgation of the regulation came within the rulemaking power of the Administrator under § 4 of the Administrative Procedure Act, 5 U. S. C. § 1003, that a hearing was not required by any statute or by the Constitution, and that the age sixty limitation was neither arbitrary nor unreasonable. 276 F. 2d 892.

Thereafter, on the same record, the district court entered summary judgment dismissing the complaint, and the plaintiffs again appeal. No issues not previously considered by us are raised other than the contention that the district judge erroneously vacated a notice of deposition of one Dr.

Goddard, a Civil Air Surgeon, and stayed the taking of the deposition of the defendant. The surgeon was not a party to the proceedings and did not reside within the subpoena area prescribed by Rule 45 of the Federal Rules of Civil Procedure; moreover, after the notice was vacated the plaintiffs failed to avail themselves of any other means to take his testimony. Cross-examination of the Administrator with respect to the basis for his policy decisions, a matter requiring the exercise of discretion and judgment, would not be proper, *United States* v. *Morgan*, 313 U. S. 409, 422 (1941), and the district court committed no error in staying such an examination.

The record reveals no disputed issues of fact that could have affected the outcome of the case. Accordingly, we affirm the summary judgment entered by the district court.

No. 959

In the Supreme Court of the United States

OCTOBER TERM, 1960

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL.,
PETITIONERS

v.

ELWOOD R. QUESADA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
WILLIAM H. ORRICK, JR.,
MORTON HOLLANDER,
EDWARD A. GROOBERT,
Department of Justice, Washington, D.C.

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OCTOBER TERM, 1960

No. 959

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL., PETITIONERS

v.

ELWOOD R. QUESADA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York denying the petitioners' motion for a preliminary injunction is reported at 182 F. Supp. 595 (App. 315a–321a).[1] The opinion of the Court of Appeals affirming the denial of that motion is reported at 276 F. 2d 892 (Pet. App. 65a–75a).[2] The decision of the District Court granting the respondent's motion for dismissal

[1] App.—refers to the appendix filed by the petitioners in the Court of Appeals in Case No. 26174.

[2] Pet. App.—refers to petitioners' appendix in their petition for certiorari.

of the complaint is not reported (Pet. 2). The opinion of the Court of Appeals affirming the dismissal of the complaint is reported at 286 F. 2d 319 (Pet. App. 76a–78a).

JURISDICTION

The judgment of the Court of Appeals affirming the dismissal of the complaint was entered on February 9, 1961. The petition for certiorari was filed on May 11, 1961, pursuant to an extension granted by Mr. Justice Harlan. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the imposition of a 60 year age limit for commercial air line pilots is a reasonable exercise of the authority of the Administrator of the Federal Aviation Agency to issue regulations to promote safety.

STATUTES AND REGULATIONS INVOLVED

The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301, *et seq.*, provides in pertinent part:

> SEC. 601 [72 Stat. 775, 49 U.S.C. 1421].
>
> (a) *Minimum standards; rules and regulations.*
>
> The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> * * * * * *
>
> (5) Reasonable rules and regulations governing, in the interest of safety, the maximum

hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

* * * * * *

SEC. 609 [72 Stat. 779, 49 U.S.C. 1429].

§ 1429. *Reinspection or reexamination; amendment, suspension, or revocation of certificates; notification; hearing; appeal to Board; judicial review.*

The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of

emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. * * *

Civil air regulations:

14 C.F.R. 40.260, 41.48, and 42.40, effective on March 15, 1960, provide in pertinent part:

> * * * No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft[3] while engaged in air carrier operations.
>
> * * * * *

The Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001, *et seq.*, provides in pertinent part:

> § 1001. *Definitions.*
>
> As used in this chapter—
>
> * * * * *
>
> (c) *Rule and rule making.*
>
> "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and in-

[3] In Regulation 42.40 the words "large aircraft" are used.

cludes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) *Order and adjudication.*

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * * * *

§ 1003. *Rule making.*

* * * * *

(a) *Notice; publication, and contents.*

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the

rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

* * * * *

STATEMENT

Section 601(a) of the Federal Aviation Act of 1958, *supra*, p. 2, requires the Administrator of the Federal Aviation Agency to prescribe rules and regulations promoting safe air travel. Pursuant to this authority, the Administrator[*] and his medical staff began an extensive study of the aging process in order to determine whether the older pilots were physicially reliable to operate aircraft "with the highest possible degree of safety" (§ 601(b); App. 254a). The Administrator

[*] Najeeb Halaby was appointed Administrator of the Federal Aviation Agency on January 19, 1961. Mr. Halaby was substituted as defendant in this action on February 23, 1961, by the Court of Appeals for the Second Circuit.

regarded this problem of pressing importance because for the first time in aviation history there were a number of pilots aged sixty years or more (App. 255a).

The study revealed a progressive deterioration of many physiological and psychological functions as a person grows older, particularly a greatly increased susceptibility to sudden strokes and heart attacks (App. 256a). It also recognized that medical science is unable to predict with any degree of accuracy whether an individual is likely to suffer such a sudden incapacitation. Thus, a study of a large group of industrial employees showed that 85% of the employees who suffered a heart attack for the first time did so within six months to one year after a thorough physical examination in which the individual had been found to be in a condition normal to his age and without any evidence suggesting the imminence of such an attack (App. 256a).

Therefore, the Administrator determined that the existing regulations requiring rigorous periodic physical examinations of airmen did not adequately protect the public and that a maximum age limit for pilots was necessary (App. 256a–257a). The maximum was set at sixty after the Administrator learned that:

(1) statistical information compiled by the National Office of Vital Statistics showed that the mortality rate per one thousand white males from heart disease was 50 per cent higher between the ages of 60 to 64 than it was in the age group 55 to 59 (App. 257a–258a). The incidence of death from strokes in the 60 to 64 year old group was almost

twice that for the age group 55 to 59, and more than three times that for those in the 50 to 54 age group (App. 258a);

(2) a panel of experts in the field of aviation medicine and safety had agreed that a maximum age limitation of sixty should be established, while some even suggested that the maximum should be lower (App. 258a–259a); and

(3) inquiry made of the practices of five major foreign air carriers revealed that two had established retirement ages of 60 and two of 55 (App. 258a).

On June 27, 1959, the Administrator published in the Federal Register his intention to amend the Civil Air Regulations by establishing a 60 year age limitation for pilots (Pet. 4). In accordance with the rule making requirements of the Administrative Procedure Act, 5 U.S.C. 1003, *supra*, p. 5, interested parties were invited to submit written data and briefs. About 100 comments were filed, including those of the petitioner Pilots Association. The medical opinion received overwhelmingly favored the regulation. Accordingly, the Administrator issued on December 1, 1959, the 60 year age regulation, *supra*, p. 4.

Petitioner Air Line Pilots Association, a union of airline pilots, together with the individual petitioners, who are airline pilots, brought this suit in the District Court for the Southern District of New York seeking an injunction and a declaratory judgment that the regulation was null and void. They claimed that the rule was invalid because it allegedly had the effect of modifying and revoking pilots' certificates by limiting their duration without complying with the procedural

requirements of § 609 of the Federal Aviation Act of 1958 (App. 9a). The petitioners also asserted that the Administrator's action was unconstitutional because it deprived them of their property rights in the certificates without due process of law, and also because the action was arbitrary (App. 9a). Finally, the petitioners contended that the pilots were entitled to a hearing under the Administrative Procedure Act, 5 U.S.C. 1004 and 1008 (App. 9a).

The petitioners moved for a preliminary injunction. The respondent moved for summary judgment. The district court denied the motion for a preliminary injunction. On appeal, the Court of Appeals for the Second Circuit, in an opinion written by Chief Judge Lumbard and concurred in by Judges Hand and Hincks, rejected both of the petitioner's contentions, sustained the validity of the regulation and affirmed the denial of the preliminary injunction. The District Court then granted the respondent's motion for summary judgment, and dismissed the complaint. On a second appeal, the Court of Appeals, with Judges Lumbard, Medina and Smith sitting, again affirmed.

ARGUMENT

The petitioners seek review by this Court on the same grounds that they urged below. The decisions by the Court of Appeals that the safety regulation is not unreasonable and that the Administrator was not required by the Constitution, the Federal Aviation Act of 1958, or the Administrative Procedure Act to afford the pilots a hearing before issuing the regulation are correct. The petition should be denied.

1. There can be no serious challenge to the fact that the promulgation of this safety regulation constituted rule making. The Administrative Procedure Act, 5 U.S.C. 1001(c), *supra*, p. 4, defines a rule as "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *." See also Davis, *Administrative Law Treatise* § 5.01 (1958 ed.); Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 265 (1938). As the court below held, the regulation involved is just such a statement.

It follows that the Administrator was not required by the Administrative Procedure Act to hold hearings before issuing the directive. *Air Line Pilots Ass'n, Int'l* v. *Civil Aeronautics Board*, 215 F. 2d 122 (C.A. 2). A hearing is only required in connection with rule making when the "rules are required by statute to be made on the record after opportunity for an agency hearing * * *", 5 U.S.C. 1003(b), *supra*, p. 6. The Federal Aviation Act of 1958 does not contain such a requirement.

2. The petitioners argue that the regulation is void because it has the effect of amending, modifying, suspending or revoking pilots' certificates by limiting their duration[5] without compliance with the pro-

[5] It should be noted here that the petitioners' argument is based on the mistaken assumption that a pilot's certificate is of unlimited duration and that the 60 year age regulation amends or revokes the certificate because it limits the duration. Each certificate itself provides that "This certificate is of such duration as is provided in the currently effective

cedural requirements of § 609 of the Federal Aviation Act of 1958, *supra*, pp. 3–4. It is clear from the face of the statute and its legislative history that § 609 has no bearing on the rule making procedure, but applies only when an order of the Administrator is directed at an individual airman and concerns conduct and other facts peculiar to that airman.

Thus, § 609 provides that "the Administrator may * * * reexamine any civil airman", and if as a result of such reexamination the Administrator "determines that safety in air commerce * * * and the public interest requires, [he] may issue an order amending * * * or revoking * * * [any] airman certificate * * *." Further, the House Report states that the Administrator may, "after affording the person affected * * * an opportunity to be heard * * *, amend * * * the certificate in question." U.S. Code, Congressional & Administrative News, 1958, 3741, 3756.

If § 609 were applied to a safety regulation which affected certificates, the 18,000 certificate holders would be entitled to a hearing before adoption, then to an appeal to the Civil Aeronautics Board, and, finally, to judicial review of the Board's order. However, it is abundantly clear that Congress intended that the Ad-

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Civil Air Regulations, unless sooner suspended or revoked." (App. 286a–287a.) Therefore, it was contemplated at the time the certificate was issued that the holder's rights in the certificate are subject to limitation as to duration by a duly issued regulation, whether the regulation provided that the certificate would expire after one year, five years, or when the holder reached age 60. Since the pilots held the certificates at the will of the Administrator, the Administrator's action could not have deprived them of any substantial property rights.

ministrator was to "be given full safety rulemaking authority without review by the Civil Aeronautics Board" in order to prevent division of responsibility and duplication of effort, and to insure that there would be timely and effective safety rules. U.S. Code, Congressional & Administrative News, 1958, 3741, 3747. The constitutionality and validity of safety rules was to be determined in accordance with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 1009. U.S. Code, Congressional & Administrative News, 1958, 3741, 3746–47, 3761; Senate Report No. 1811, 85th Cong., 2d Sess. (1958), 10–12; Hearings before the Sub-Committee on Aviation of the Senate Committee on Interstate and Foreign Commerce on S. 3880, 85th Cong., 2d Sess., 165–166. Consequently, the application of § 609 to this situation could not be squared with the Congressional intention that the Civil Aeronautics Board should not have power to review safety regulations. As the Court of Appeals said:

> The elaborate procedural requirements of § 609 are patently incompatible with the expedition with which Congress intended that the Administrator should act in the promulgation of safety rules. The clear public interest in the speedy adoption of rules relating to air safety far outweighs any possible advantage in a multitude of piecemeal and time-consuming hearings brought by each contesting airman. [Pet. App. 73a.]

The petitioners' assertion that the safety regulation is invalid because it amends their certificates without

complying with § 609 is similar to the argument which this Court rejected in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. In *Storer*, the Federal Communications Commission, acting within its authority to promulgate general rules in the public interest, ruled that it would not grant broadcast licenses to parties who already owned interests in five other stations. The Federal Communications Act provided that applications for a license could not be denied without a hearing. This Court flatly rejected the contention that the regulation was invalid because it had the effect of denying certificates without a hearing.

3. The fact that pilots are affected by the regulation, because it results in the termination of some certificates and the limitation of the duration of others, did not require the Administrator to grant each petitioner a hearing before adopting the regulation. It is well settled that the exercise of a power to issue general rules need not be preceded by a hearing even though the rule limits or destroys property rights. *State Railroad Tax Cases*, 92 U.S. 575, 609–610; *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441; *Breiholz* v. *Board of Supervisors*, 257 U.S. 118; *Bowles* v. *Willingham*, 321 U.S. 503, 519–521; Davis, *Administrative Law Treatise* (1958 ed.), §§ 6.05, 6.12, 7.07. The agency is acting as a legislative body, *Bowles* v. *Willingham*, *supra*, and affording each affected individual a hearing would often destroy the agency's rule making power, *Bi-Metallic Investment Co.* v. *State Board of Equaliza-*

tion, supra. This certainly would be the case here if the Administrator had to grant each certificate holder, some 18,000 airmen, a hearing. The Court of Appeals stated:

> Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See *United States* v. *Storer Broadcasting Co., supra; Bowles* v. *Willingham*, 321 U.S. 503, 519-520 (1944). Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected—here some 18,000—might demand to be heard individually. [Court's footnote omitted.] [Pet. App. 71a.]

The cases the petitioners rely on are not pertinent here. They involved orders directed at specific parties rather than general policy decisions applicable to unnamed and unspecified persons. *Federal Communications Commission* v. *National Broadcasting Co., Inc.; (KOA)*, 319 U.S. 239; *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 170 F. 2d 793 (C.A.D.C.); *Philadelphia Co.* v. *Securities Exchange Commission*, 164 F. 2d 889 (C.A.D.C.), vacated and

dismissed as moot, 337 U.S. 901; *In re Carter*, 177 F. 2d 75 (C.A.D.C.).[8]

4. The petitioners assert that the rule is unconstitutional because the Administrator's action was arbitrary. They ask this Court, in effect, to reverse the Administrator's judgment on the basis of a few items of evidence which the Administrator and his staff of experts had already considered. However, in reviewing rule making, the courts have traditionally limited their inquiry to a determination as to whether the regulation has a reasonable relation to a legitimate end. *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 311; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224; *American Trucking Assns.* v. *United States*, 344 U.S. 298; *Air Line Pilots Ass'n, Int'l* v. *Civil Aeronautics Board*, 215 F. 2d 122 (C.A. 2). Clearly, the evidence that: the number of pilots over 60 years of age is increasing; that sudden incapacitation because of heart attack and stroke is more frequent as men approach age 60; that medical science is unable to determine in advance which individuals are likely to suffer such attacks so that the periodic examinations of the pilots are not a sufficient protection; and that aviation safety and medical experts advocated a maximum age of 60 or

[8] This issue is quite distinct from the question of whether a person affected by such a rule or regulation is entitled to a review of its legality. The fact that the regulation may be considered an "order" for the purposes of review, *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, does not mean that every person affected is entitled to the type of hearing provided for an adjudicative proceeding.

less, supports the Administrator's judgment that the regulation was necessary to protect the air travelling public.[7]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1961

[7] The regulation was held reasonable in *Chew* v. *Quesada*, 182 F. Supp. 231 (D.D.C.).

U. S. GOVERNMENT PRINTING OFFICE 1961